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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 830

THE SEMINOLE NATION, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED DECEMBER 31, 1941.

CERTIORARI GRANTED FEBRUARY 16, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. L-208

THE SEMINOLE NATION,

vs.

THE UNITED STATES.

I. HISTORY OF PROCEEDINGS

The Original petition was filed May 31, 1930.

On December 27, 1937, on motion made therefor, and allowed by the court, the plaintiff filed its amended petition which is as follows:

II. AMENDED PETITION

(Original Petition Filed May 31st, 1930.)

(Amended Petition Filed December 27, 1937.)

To the Honorable, the Court of Claims:

The plaintiff, the Seminole Nation, respectfully represents:

I

That by a certain act of Congress, approved May 20, 1924 (43 Stat. 133, as modified by Joint Resolution approved May 19, 1926, 44 Stat. 568, giving permission to file separate petitions, and Joint Resolution of February 19, 1929, 45 Stat. 1229, extending the time for filing suits until June 30, 1930, and by a certain act of Congress, approved August [fol. 2] 16, 1937, Public No. 296, 75th Congress, 1st Session, Chapter 651, permitting amended petitions to be filed prior to January 1, 1938), plaintiff was authorized and empowered to bring and maintain this action.

II

That all times mentioned herein, and for many years prior thereto, the Seminole Nation was the owner in fee of a large tract of land situated in what is now the State of Oklahoma, and of large sums of money held in trust for it by the United States under various treaty provisions.

III

That the defendant, acting in its capacity of guardian of said Seminole Nation, on March 21, 1866, entered into a treaty with plaintiff (14 Stat. 755), Article 3 of which treaty provides in part as follows:

"Article 3. * * * The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to-wit: Beginning on the Canadian River where the line dividing the Creek lands [fol. 3] according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian River; thence up said north fork of the Canadian River a distance sufficient to make two hundred thousand acres by running due south to the Canadian River; thence down said Canadian River to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written."

IV

That by the terms of said Article 3 the said Seminole Nation purchased said 200,000 acres of land in fee simple, which said lands thereafter constituted its National Domain; that under said treaty it became the duty of the United States to cause the boundary lines of said lands to be accurately surveyed and established.

V

That in 1866, the Seminoles were removed to and placed upon lands, which were then believed by the officers of defendant to be the new National Domain purchased by [fol. 4] said Seminole Nation in said treaty of March 21, 1866.

VI

That in 1871, pursuant to its said treaty duty, the United States delegated one Frederick W. Bardwell to survey and establish said Creek dividing line, which was to become the eastern boundary line of said Seminole National Domain under Article 3 of said Treaty of March 21, 1866. Said Creek dividing line, as run by said Bardwell, thereafter known as the Bardwell line, was approved by the Secretary of the Interior in 1872.

VII

That by the Treaty of February 27, 1867, 15 Stat. 531, between the Pottawatomie Indians and the United States, it was provided in Article I thereof that:

"It being the intention of the Government that a commission shall visit the Indian country as soon as practicable after the ratification of the treaties contemplating the removal of certain tribes from Kansas, accompanied by delegates from the several tribes proposing to remove, it is agreed that a delegation of the Pottawatomies may accompany said commission in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location [fol. 5] shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie Nation."

VIII

That said Pottawatomie Indians, having selected lands immediately west of and adjoining the said Seminole National Domain, on November 9th, 1870, the Secretary of the Interior, by order, set aside said lands for the Pottawatomies, and said Indians were removed thereto in 1872.

IX

That because of an erroneous survey of the said Seminole National Domain, made by one Nathaniel Robbins in

1871, and approved by the Secretary of the Interior on February 5, 1872, 11,550.54 acres of the 200,000-acre tract so acquired by said Seminole Nation under Article 3 of said Treaty of March 21, 1866, was excluded from said Seminole National Domain and included in said Pottawatomie Reservation.

[fol. 6]

X

That by an agreement between the United States and the Pottawatomies, ratified in the Act of March 3, 1891, 26 Stat. 989, 1016, the Pottawatomie Indians ceded to the United States the tract assigned to them under their Treaty of 1867. In said agreement the United States stipulated that it would make and confirm allotments in severalty to said Pottawatomie Indians out of lands within their cession; and the ratifying act further provided that the remaining lands be opened to settlement as public lands and sold to white settlers at a stated price per acre under the homestead laws, and the proceeds thereof was to be turned into the treasury as public money.

XI

That under said Act of March 3, 1891, said 11,550.54 acres belonging to said Seminole Nation, were erroneously treated as a part of said Pottawatomie Reservation, and were either allotted to Pottawatomie Indians, or disposed of to white settlers under said homestead laws.

XII

That defendant has known, or has had good reason to know, that said errors existed for many years; that as guardian of plaintiff, the defendant was under a plain duty to rectify said errors by putting plaintiff in possession of [fol. 7] its said 11,550.54 acres of land so erroneously disposed of; that well knowing that plaintiff had no means of recovering said land except through the action of defendant, and notwithstanding its said plain duty, the defendant has refused and neglected, and still refuses and neglects to cancel said erroneous disposals, or to redress the plaintiff for the loss of its said lands.

XIII

That although having full knowledge of the facts and circumstances, yet defendant has permitted said erroneous

disposals to stand, thus confirming said disposals by retaining all the benefits it has received from them; therefore, the defendant, in violation of the rights of plaintiff, has appropriated said lands in circumstances which involved an undertaking by it to make just compensation to plaintiff for said lands so taken, under the Fifth Amendment to the Constitution of the United States.

Wherefore, the premises considered, the plaintiff, said Seminole Nation, prays for judgment against the defendant for the value of said 11,550.54 acres of its said National Domain thus taken by defendant, with such addition thereto as may be required to produce the present full equivalent of the value paid contemporaneously with said taking, which is interest on said values at 5 per centum per annum from [fol. 8] the dates of said erroneous disposals to date of judgment, and that plaintiff may have such other and further relief as to the Court may seem just and proper.

The Seminole Nation, By Paul M. Niebell, Its Attorney of Record.

Of Counsel: W. W. Pryor, (E. J. Van Court, Deceased).

Duly sworn to by Paul M. Niebell, jurat omitted in printing.

[fols. 9-10] III. General Traverse—Filed Feb. 14, 1938

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Carl McFarland, Assistant Attorney General.

IV. Argument and Submission of Case

On April 10, 1941, the case was argued and submitted on merits by Mr. Paul M. Niebell for plaintiff, and by Mr. Wilfred Hearn for defendant.

[fol. 11] **V. Special Findings of Fact, Conclusion of Law and Opinion of the Court by Whitaker, J.**—Filed May 5, 1941

Mr. Paul M. Niebell for the plaintiff. *Messrs. W. W. Pryor* and *C. Maurice Weidemeyer* were on the briefs.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

1. Plaintiff's claim is asserted in its amended petition filed herein on December 27, 1937, pursuant to the authority granted by acts of Congress of August 16, 1937 (c. 651, 50 Stat. Part I, 650); February 19, 1929 (45 Stat. 1229); May 19, 1926 (c. 341, 44 Stat. 568); and May 20, 1924 (c. 181, 43 Stat. 133).

2. By the treaty of March 21, 1866 (14 Stat. 755) the United States granted to the plaintiff 200,000 acres of land immediately west of the eastern portion of the Creek lands. Article III of said treaty provides in part as follows:

• • • The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to wit: Beginning on the Canadian river where [fol. 12] the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866 [June 14, 1866], following said line due north to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the

sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written. * * *

3. In the fall of 1866 the Seminoles were removed by the United States to what was believed to be their new national domain, and thereafter occupied said lands and made improvements thereon. At this time the boundaries of said domain had not been established.

In 1871 the line dividing the eastern and western parts of the Creek domain was run by Frederick W. Bardwell, and was approved by the Secretary of the Interior on February 5, 1872. This line became the eastern boundary of the Seminole national domain, as provided for in the Seminole treaty of March 21, 1866.

Shortly thereafter, within about two months, Nathaniel Robbins was employed by the defendant to run the western line of the plaintiff's domain so as to include the 200,000 acres which the defendant had granted to plaintiff. This survey was completed in 1871 and was approved by the Secretary of the Interior February 5, 1872. According to Robbins' calculations, the number of acres included between the Canadian River on the south, the North Fork of the Canadian River on the north, the Bardwell line on the east, and the Robbins' line on the west, was 200,000.00 acres.

4. The defendant granted to the Pottawatomie Indians of Kansas a certain tract of land immediately west of the plaintiff's domain, and subsequently allotted and patented said lands to said Indians in severalty, or sold and patented them to settlers thereon and turned the purchase price [fol. 13] thereof into the Treasury as public money. Thereafter said lands have been held by the grantees adversely to the plaintiff.

It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54 acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others.

5. After the Bardwell line separating the eastern from the western half of the original Creek domain had been run, it was discovered that the plaintiff had been located on a

large part of the Creek domain east of the Bardwell dividing line, which lands had been reserved by the Creek Nation. In order to remedy this situation, the defendant purchased from the Creek Nation 175,000 acres of its domain immediately east of the Bardwell dividing line and between the Canadian River on the south and the North Fork of the Canadian River on the north, and this 175,000 acres, more or less, was added gratuitously to the original Seminole reservation of 200,000 acres, more or less. This acreage was added to the Seminole domain at the expense of the defendant and without cost to the plaintiff.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Opinion

Whitaker, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover the value of an alleged deficit in the number of acres the defendant agreed to set apart for it as a reservation. By the treaty of 1866 the United States acquired from the Creek Nation the westerly half of their lands; and it granted to the plaintiff 200,000 acres of these lands immediately west of the lands retained by the Creeks and between the Canadian River on the south and the North Fork of the Canadian River on the north. However, when the defendant undertook to settle the plaintiff on their said [fol. 14] reservation, by accident it settled them instead on a part of the lands retained by the Creeks. When this error was discovered, the defendant purchased from the Creek Nation at its own expense and without cost to plaintiff 175,000 additional acres immediately east of plaintiff's original reservation and added this to the original reservation of 200,000 acres.

When the defendant came to survey and fix the boundaries of the original reservation of 200,000 acres, it is alleged that it included therein only 188,449.46 acres, and it later gave to another tribe the remainder of 11,550.54 acres. The plaintiff sues to recover the value of this deficit.

Plainly it cannot recover. Although there may have been this deficit, more or less, in the 200,000-acre tract the defend-

ant was obligated to set apart for plaintiff, the plaintiff was compensated therefor fifteenfold by the addition to the reservation of 175,000 or more additional acres immediately to the east. The plaintiff was entitled to receive from the defendant only 200,000 acres, but it has in fact received at least 360,000 acres and, therefore, cannot complain that there was a small deficit in the original 200,000-acre tract agreed to be set apart to it.

Moreover, under the act of August 12, 1935 (49 Stat. 571, 596), the defendant is entitled to an offset of "all sums expended gratuitously by the United States for the benefit of the said tribe or band." Therefore, if the plaintiff be entitled to recover for any deficit in the 200,000-acre tract, the defendant would be entitled to an offset of the value of the acreage given them gratuitously. This value is far in excess of the value of whatever deficit there may have been.

Plaintiff's petition will be dismissed. It is so ordered.

JONES, *Judge*, and LITTLETON, *Judge*, concur.
WHALEY, *Chief Justice*, dissents.

CONCURRING OPINION

MADDEN, *Judge*, concurring:

I concur in the result arrived at by the Court, because of the provision of the Act of August 12, 1935.

When the defendant settled the Seminoles on the wrong land, and they made their improvements there, there was an obligation on the defendant to repair its mistake. How-
[fols. 15-16] ever, the purchase of the 175,000 acres from the Creeks, and its addition, without further consideration, to plaintiff's reservation, comprised a considerable element of gratuity, in addition to this element of reparation. That gratuity would, as is said in the Court's opinion, more than offset the money claim here asserted for the loss of some 11,000 acres, if that loss actually occurred.

[fols. 17-18] VI. JUDGMENT OF THE COURT—May 5, 1941

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is Therefore Adjudged and Ordered that the plaintiff's petition be and the same is hereby dismissed.

VII. Proceedings After Judgment

On July 9, 1941, the plaintiff filed a motion for an extension of time to July 11, 1941, within which to file a motion for a new trial, and said motion was allowed July 9, 1941, by the court.

On July 10, 1941, the plaintiff filed a motion for a new trial.

On October 6, 1941, the court entered the following order on said motion:

Order

It is Ordered this 6th day of October, 1941, that the plaintiff's motion for new trial be and the same is hereby overruled.

On November 19, 1941, the plaintiff filed a request for record in re certiorari under Rule 99 (a) and 99 (b).

[fols. 19-20] Order Settling Record

The plaintiff having filed a petition for writ of certiorari to the Supreme Court in the above styled case, and the parties having requested and agreed that the portions of the evidence attached hereto be included in the record to be certified to the Supreme Court, and the Court having found such portions to be accurate transcripts of portions of the original record material to the errors assigned, the same are this December 10, 1941, settled and approved as portions of the evidence to be included in the record to be certified to the Supreme Court.

By the Court:

Richard S. Whaley, Chief Justice.

[fol. 21] IX. Portions of the Record Agreed to by Parties as Material to Errors Assigned—Filed December 8, 1941

[fol. 22] Extracts from the Report of Arthur D. Kidder, District Cadastral Engineer of the General Land Office, to the Commissioner of the General Land Office, Dated March 18, 1941

The following report is submitted in response to office instructions dated January 14, 1941 (1810212-"E") in

which a field examination was required with respect to the location of the "Creek Dividing Line", and the lines of certain later surveys that were related thereto.

The investigation was ordered on the request of the Department of Justice in letter dated January 3, 1941, for the bearing of such facts as can now be ascertained by thorough search on the ground, and the value of such evidence in the case of The Seminole Nation v. The United States, No. L-208, United States Court of Claims.

The field work was begun on January 22, 1941, and was completed on February 28, 1941. Three surveying parties of the General Land Office engaged in the work, headed by cadastral engineers who have had a broad experience in land surveying practice.

The areas that are involved in the suit are situated in Seminole County, in the State of Oklahoma. That portion of the Creek Dividing Line which is in question is about thirty-five miles in length, extending from the Canadian River northward to the north fork of that stream. By the provisions of early treaties the area that lies on the east of the boundary was a part of the diminished Creek Indian Lands; on the west, the Seminole Indian lands. Through later treaties and surveys the Seminole Indian Nation acquired the title to the lands lying on the east.

There is no present interest in the boundary excepting as to the question of its location as this may be indicated by the marks on the ground and by the field-note record of the survey thereof, executed by Frederick W. Bardwell, who was engaged for the purpose, and who ran the line between the dates of August 16 and 22, 1871. These field [fol. 23] notes are now filed in the National Archives. The field notes were approved on February 5, 1872, by the Secretary of the Interior.

The Seminole 200,000-acre Tract

In 1871, shortly after the survey of the Creek Dividing Line by Bardwell, the survey of the north and west lines of the Seminole tract, intended to embrace 200,000 acres, was made by Nathaniel Robbins, on the authority of the Commissioner of Indian Affairs; this survey was approved February 5, 1872, by the Secretary of the Interior.

In the Robbins survey, the south bank of the North Fork of the Canadian River was meandered upstream, running

to the point for the northwest corner of the tract; thence a line was run south to the Canadian River, to the southwest corner. The meander courses of the Canadian River are contained in the Bardwell field notes.

The questions with respect to the Robbins survey are (1) whether the beginning point of the meander courses agreed with the location of the Creek Dividing Line; and, (2) as to the true area of the tract included within the boundaries as surveyed.

It appears very evident, after a thorough field examination, that Robbins began his survey at a point that was not in agreement with the dividing line, and that the area which is actually included within the tract boundaries is much less than 200,000 acres.

There are several factors that contribute to the discrepancy in area: (1) the beginning point was east of the dividing line; (2) the Robbins meander courses are not correct as to their direction from true north; and, (3) the length of the Bardwell east boundary, from north [fol. 24] to south, is very much less than the distance that is given in the field notes. These factors are of as much consequence as that of the conflict, if so regarded, with respect to the survey of the 175,000-acre tract. The field examination has not sustained the certainty of an actual overlap in the surveys, excepting by reliance on the Bardwell record without regard to the Hackbusch retracement.

The total wasting in the meander courses along the north fork is recorded in the Robbins field notes (p. 888, General Land Office copy) as being 708.02 chains; this is 8 miles 68.02 chains. The northwest corner, on the river bank, was identified in 1895 in the subdivisional survey of T. 11 N., R. 5 E. When the distance of 8 miles 68.02 chains is tested by transfer from west to east through the township boundary lines, the point on the river in sec. 25, T. 11 N., R. 6 E., is 8.45 chains (558 feet) to the west of the east boundary of the township. This is 17.50 chains (1155 feet) east of the Creek Dividing Line as the location of that line is indicated by the Bardwell field-note record. It is 21.30 chains (1406 feet) east of the dividing line as the location was determined according to the marks of the line, as identified by the Hackbusch retracement (1888), and described in the field notes.

The meander courses in sec. 25, T. 11 N., R. 6 E., have been (1941) carefully run. There has been no appreciable

change in the bank since 1895, or since 1871 as nearly as the meander courses can be compared. This test places the Robbins point of beginning even more to the east, or not over 2.50 chains (165 feet) to the west of the east boundary of the township. There appears to be nothing to support the latter position, excepting that it conforms with the location of the nearest marks of the Rankin west boundary (1868, unapproved) that were found in secs. 24 and 25, T. 9 N., R. 6 E.

[fol. 25] The Robbins field notes indicate that the meander courses were run on a magnetic variation of 10°00′ E. (p. 805, General Land Office copy). The magnetic variation in 1895 as taken from the township plat was 8°45′ E.; the correction to 1871, to be added, is 1°06′ (U. S. Coast and Geodetic Survey, Serial 592, 1936, p. 17). Thus the actual magnetic variation in 1871, at the Robbins point of beginning was approximately 9°51′ E.; accordingly, the Robbins meander courses, in order to orient to the true meridian, require a correction of 0°09′, to be added to NE. and SW. courses; subtracted from NW. and SE. courses, as recorded. However; the plotting of the Robbins meander courses, when compared with those of the subdivisional survey of Tps. 11 N., Rs. 5 and 6 E., show a discrepancy of approximately 2°45′ in orientation. This is illustrated on the diagram that was prepared in the General Land Office (see defendant's brief, p. 139). The effect of this discrepancy was to indicate a greater calculated area for the Robbins tract that was actually included within the boundaries. The area of the strip that lies between the Robbins meander courses, as plotted from the field notes, and the meander line that is along the actual course of the river is approximately 1100 acres.

The strip of land of the Robbins tract, running from north to south, and that lies to the east of the Bardwell boundary, as that location is indicated by the field-note record (disregarding the Hackbusch retracement) contains approximately 3700 acres. The area of the *additional* strip that lies to the east of the boundary as found by the Hackbusch retracement is 4632 acres.

The actual length of the east boundary of the 200,000-acre tract, between the rivers, when measured along the location that is indicated by the Bardwell field-note record, is 30.35 chains (2003 feet) less than the Bardwell record

distance; by the Hackbusch retracement it is 28.95 chains [fol. 26] (1911 feet) less than the Bardwell record distance.

The actual length of the west boundary of the 200,000-acre tract, between the rivers, as taken from the township plats, is 28.86 chains (1905 feet) *greater* than the Robbins field note record distance.

As a consequence of the above known discrepancies it is impracticable to adjust the Robbins lines to secure a closure for the computation of the enclosed area. The showing is made that the tract contains 200,000 acres, but the calculation cannot be verified. It is necessary to abandon the Robbins record and take the directions and lengths of lines as these are found on the ground; this subject will be continued after showing the Hackbusch retracement.

The Hackbusch Retracement

* * * * * * *

The Hackbusch location (1888) has been recovered for the whole distance from the Canadian River to the North Fork of the Canadian River. From this line, as found by the marks, accurate connections to the subdivisional surveys have been made in a number of places, by which to draw the line of the township plats.

The Hackbusch line is found to be marked through the older timber by the blazing on the trees. These marks are now completely overgrown; they have been identified in considerable number by testing with an increment borer, and by occasional blocks that have been removed as samples.

The Hackbusch field-note record stream-crossings in the true-line position at Salt Creek, Little River, and both branches of Wewoka Creek are found to be accurate.

* * * * * * *

The true-line location, as indicated by the marks on the trees, differs only slightly from the position that is shown [fol. 27] by the field-note record. The field notes and the line on the ground are in substantial agreement, and are regarded as an entirely acceptable survey. The accuracy is far above the average of the land-surveying practice of that date. It is of even greater importance to state that through the marks that have been identified, and the accurate measurements, the work was faithfully executed, and the field note record may be relied upon.

There are three points of control for the Hackbusch location that relate directly to the field-note record by Bardwell, 1871. These are the initial point on the Canadian River; the 4th mile station; and the 38th mile station. The latter is located on the boundary at a point that is about three miles north of the North Fork of the Canadian River. No other marks of the Bardwell survey were found by Hackbusch, excepting the 40th mile station, which was identified and used to verify the 38th.

* * * * * * * *

The Application of Surveying Rules

The rules for the restoration of lost or obliterated corners have their origin in the principle that a survey which was faithfully made can be restored or reconstructed by adhering closely to the marks of that survey, and by following the method and order of procedure by which it was first laid out. In the absence of marks, and upon the demonstration of gross error or fraud, it is not to be presumed that a survey can be reconstructed, but rather that a retracement and resurvey can be made, to be based upon the best available evidence of the original lines and marks, such as will supply the data with respect to the facts and afford the needed protection of the property rights whose locations have been derived from the original record.

These rules and principles are of long standing. It has [fol. 28] been shown that the rules were given full weight at the time of the retracement, in 1888, when it became evident that the Bardwell survey of the Creek Dividing Line, in 1871, had not been faithfully executed, that it was grossly erroneous, and that few marks had been made for its perpetuation. The field examination of 1941 has served to confirm the present complete absence of original Bardwell marks through the Seminole lands.

The Hackbusch field-note record (1888) supplies the identification of the initial point on the Canadian River, and of the 4th and 38th mile stations. The sufficiency of that evidence and the question of its authentic character were given careful consideration by Hackbusch, by Martin who examined the survey, and by the Commission of the General Land Office on the review of these questions prior to the approval of the Hackbusch retracement.

It is found additionally in the 1941 field examination that the placing of the boundary along the line of this control

was strictly in accord with approved surveying practice; the position of the boundary, as thus restored, in its relation to the official subdivisional surveys, has been ascertained.

The plaintiff in this case alleges a gross shortage in the Robbins survey of the Seminole 200,000-acre tract, and relies on the location of the Creek Dividing Line as determined by the Hackbusch retracement. The defendant contends that the boundary should be restored strictly by reference to the Bardwell field-note record, disregarding the retracement, and that the Hackbusch survey of the 175,000-acre tract overlaps the Robbins survey, thereby accounting for part of the shortage. The report herewith is factual with full regard to both contentions.

The principles that are involved in the opposing views are of utmost importance when applied to the very broad prob- [fol. 29] lem of the *maintenance* of all very old surveys where obliteration of marks becomes advanced. The subject may be resolved into the question of the acceptability, as evidence, of the perpetuation of marks through reliable data of later surveys that relate back to the original record.

The areas included within the boundaries as surveyed.

The *areas* of the Seminole lands are shown in the following tabulation. . . .

. . . . . .

Hackbusch Areas:	189,648.18
Shortage:	10,351.82
	200,000.00

There is a shortage of 9,152.83 acres in the intended 375,000.00 acre total area of the Seminole lands.

If the plaintiff's point of view should be sustained, there will be a resulting shortage of 10,351.82 acres in the Robbins survey of the 200,000-acre tract; an excess of 1,198.99 acres in the Hackbusch survey of the 175,000-acre tract.

. . . . . .

The party chiefs on this field examination were Jos. C. Thoma, Geo. W. Johnson, and Norville E. Shearer, cadastral engineers of the General Land Office; five experienced principal assistants took part in the work, and all deserve

much credit for their keenness in the search for marks on the forest trees. The undersigned joined in the direction of the field operations and the daily consultations.

Very respectfully, (Signed) Arthur D. Kidder District Cadastral Engineer.

[fol. 30] LETTER OF JOHN CHUPCO, CHIEF OF THE SEMINOLE NATION, AND FUS HATCHEE, SECOND CHIEF, TO THE COMMISSIONER OF INDIAN AFFAIRS, DATED MARCH 12, 1872

Seminole Agency, Mch 12th 1872.

To the Hon. Commissioner, Indian Affairs, Washington, D. C., Through the Seminole Agency

SIR:

We have the honor to address you upon what is a very important subject to us. Owing to the many rumors passing around in this country the Seminole people are feeling no little anxiety about their homes. When the Treaty of 1866 was made we were promised that our country would be surveyed that fall. We arrived here during the fall and winter of 1866. No survey having been made our Agent instructed us where to locate and we did as directed. Superintendent Byers visited us during February of 1867 told us that we were now at our home and to make all the improvement we could. Col. Wortham the next encumbent visited us in December 1867 and while here gave us every assurance we could ask that we would be by the Department of Ind. Affs protected in whatever improvement we would make. In the Spring of 1868 a survey of this country was made and we were shown our boundary lines and the majority of the Seminoles who had located outside of our boundaries left their places and moved within our lines taking and improving the places where they now live. Our friends the Creeks former owners of this country complained of the survey saying it was unjust and incorrect as it threw the dividing line of the Creek Nation too far East. As this complaint if true was of momentous interest to us we asked Superintendent L. M. Robinson who next visited us. He told us that the survey was made probably right and for us to go on and make all the advancement we could.
[fol. 31] That in any event we would not be interfered

with. That we could consider this our own home and that we would not be moved from here. We are informed by our delegates who attended and represented us at the General Council of Dec. 1870 that Col. E. S. Parker then Com. Ind. Affairs told them that no survey of this country had as yet been approved by the Department and to tell the Seminoles not to be in any way alarmed for in the event of the first survey being wrong the Seminoles should not be interfered with, that if this country should prove to belong to the Creeks they would be given other unoccupied land instead thereof, and said the Creeks have already agreed to this. We have made such improvements as we could expending all that the Government has given us as well as what we may have had of our own for we have been assured by everyone that we have asked authorized as we thought to speak for the Government, of substantially the same thing, viz., that we should not be interfered with, and we have diligently sought information from every source. Our farms that we have made would not compare favorably with those of white men in the states we know still they are very important to us. As we gain our food and shelter from them and common as they may be they are all important to us. Many of our people are old and infirm unable if deprived of their present to make new homes. The Seminoles during the years of their civilization have been continually moved about from place until we are heartily tired of moving, and if moved from here after the repeated assurances we have had of security and protection we fear many would become discouraged and lo-the to begin anew. We are informed by the Creeks that according to the new survey by virtue of late written documents from the Department they are now in possession of their entire country of which this is a part and that we the Seminoles can only remain here by becoming subject to their laws a condition of things we are in no wise willing to agree to. We respectfully call your attention to an enclosed letter marked "A" [fol. 32] which we received from No cas yarholor who is Judge of the nearest adjacent District of the Creek Nation. We have answered this letter or the latter part of it by informing him that we did not locate here in this part of the country of our own accord but in compliance with instructions from our Agent and that until we should receive direct information from the proper authority of the U. S.

we would continue to enforce our own laws over this country. We would respectfully ask an answer to this so that we may know what we are doing.

Very Respectfully, Your Obedient Servants John Chupco, Chief Fus Hatchee, 2nd Chief.

LETTER FROM JOHN F. BROWN, CHIEF OF THE SEMINOLE NATION, TO THE COMMISSIONER OF INDIAN AFFAIRS, WASHINGTON, D. C., DATED JANUARY 17, 1900

Washington, D. C., January 17th, 1900.

Hon. W. A. Jones, Commissioner of Indian Affairs.

DEAR SIR:

By Article III of the treaty of 1866, (14 Stat. 756) the United States ceded and agreed to convey to the Seminole Nation two hundred thousand acres of land.

By an agreement made in pursuance of the Act of 1873, (17 Stat. 626) which agreement bears date February 14, 1881, and is now on file in the Department of the Interior, the United States purchased from the Creek Nation one hundred and seventy-five thousand acres, for which they paid the sum of $175,000, as shown by the Act of August 5, 1882. (22 Stat. 265.) Thus making three hundred and seventy-five thousand acres purchased from the Creek Nation for the Seminoles, and upon which they had built [fol. 33] their homes. These lands were purchased in two tracts, as will be observed, and were to be surveyed and set apart by the United States, to the Seminole Nation. By an error made by the United States Surveyors in establishing the boundary of said tracts, there was, as a matter of fact, set apart to the Seminole Nation only $365,864.43 acres, leaving a deficit of 9,135.57 acres, which amount I now respectfully ask the Department to set apart to the Seminole Nation, at as early a date as may be practicable, in order that the same may be included in the Seminole allotments, for which they are now ready.

Very respectfully yours, (Signed) John F. Brown, Chf Seml Nation.

EXTRACT FROM LETTER FROM THE OFFICE OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, TO THE SECRETARY OF THE INTERIOR, DATED FEBRUARY 6, 1900

Feb. 5, 1900.

The Honorable The Secretary of the Interior.

SIR:

This office is in receipt of a communication from John F. Brown, Chief of the Seminole Nation, dated January 17, 1900, in which he refers to the treaty of 1866 with the Seminole Nation and the agreement made with the Creeks February 14, 1881, whereby 375,000 acres were purchased from the Creek Nation for the Seminoles, and states that by an error made by the United States surveyors in establishing the boundary of the tracts, there was as a matter of fact set apart to the Seminole Nation only 365,864.43 acres, leaving a deficiency of 9,135.57 acres, which amount he asks the Department to set apart to the Seminole Nation at as early [fol. 34] a date as may be practicable, in order that the same may be included in the Seminole allotments, for which they are now ready.

. . . . . .

No provision was made for the survey of the lines, nor was payment required to be made by the Seminoles for said additional lands, either in money, or by a cession of lands in the west. The Creeks were paid $175,000, as provided for in the agreement. It is not found that the Seminoles have ever paid any consideration for the additional 175,000 acres.

The recent surveys in the Indian Territory made by the Geological Survey show that the total area included in the Seminole Nation is 365,864.43 acres, as stated by Governor Brown.

. . . . . .

(Signed) W. A. Jones, Commissioner.

EXTRACT FROM LETTER FROM F. L. CAMPBELL, ACTING SECRETARY OF THE INTERIOR, TO THE COMMISSION TO THE FIVE CIVILIZED TRIBES, MUSCOGEE, I. T., DATED OCTOBER 16, 1900

* * * * * * *

August 24, 1900, you were advised that an examination of the plats and field notes of the various surveys and a compilation of the areas of the "Creek purchase" would have to be made to demonstrate if the error alleged by the Seminole Nation was in the tract granted to the Seminoles in accordance with the treaty of March 21, 1866 (14 Stat., 756).

* * * * * * *

The Department is now in receipt of a letter of October 10, 1900, from the Commissioner of the General Land Office, reporting upon its letter of August 24, 1900, in which he was directed to make an examination of the records of his office, and particularly of the returns of recent surveys of the Seminole Nation, an accurate computation to be made of the quantity of land within the boundaries as located by the surveys heretofore made of the tract purchased from the Creek Nation for the Seminoles, and to report the facts [fol. 35] to the Department.

He states that the area of the Seminole lands between the meander lines north or left bank of the Canadian river, the meander lines south or right bank of the north fork of the Canadian river, and the meridional east and west boundaries of the tract, is 365,853.18 acres; that the water surface of both streams to the middle thereof is approximately 2,730.80 acres, making a total of 368,583.98 acres; that on one of the township plats a broken line is drawn in the middle of the stream to represent the boundary between the Creek and Seminole lands where the lines of both nations have the north fork of the Canadian river for a common boundary; that if the *middle* threads of the streams are regarded as the boundaries the area is as last stated; otherwise the meander line must govern and the area is that first written; that as to the contention of the Seminoles that the east boundary of the 175,000-acre purchase is incorrectly located, it may be said that said east boundary was carefully and properly surveyed in 1888 to add 175,000 acres of land east of the "dividing line" and extending to

the meander line only of the stream forming its north and south boundaries; that it cannot be determined from the new survey exactly how much land is east of the "dividing line" because no direct connection was made therewith, but said surveys appear to indicate several hundred acres in excess of 175,000 acres, which shows that if error existed in the total area its cause will be found in the "crooked west boundary" of the 200,000 acres west of the "dividing line," or in the incorrect location of the "dividing line" itself; * * *

* * * * * * * *

It is apparent, therefore, that whatever deficit may exist it is not in the tract ceded in 1881, 175,000 acres, and therefore the Seminoles are not entitled to have any other lands segregated for them, from the Creek Nation.

* * * * * * *

[fol. 36] EXTRACTS FROM FIELD NOTES OF FREDERICK W. BARDWELL

(Defendant's Exhibit "C")

The line of division then, lies at the distance of 20 miles and 64.43/100 chains Eastward of the Meridian of the mouth of Pond Creek.

A point on the bank of the Canadian River, 14 chains and 65 links East of Station 525 of that survey, and East of Pond Creek 1858 chains and 16 links was used for the purpose of determining the initial point of the dividing line.

The distance of this point from the required line of division is 193 chains and 73 links measured on a line due West. The initial point of the dividing line was found by measuring distances along the bank of the Canadian, until the sum of the Westings computed from those distances and their bearings was sufficient to equal the whole amount of Westing required.

From the point thus found the survey proceeded as indicated on the following page.

This initial point was marked by a cedar post placed firmly in the ground and having the word Creek cut on its Eastern face, and the word Seminole cut on its Western face.

Field Notes of Survey of the Division line between the Creek and Seminole Nations, and between the Creek Nation and the United States, dividing the original Creek Country into two equal parts commencing at a point near station 534 in the Survey of the Canadian River and 20 miles and 64.43/100 chains due East of the Meridian of the mouth of Pond Creek.

At this point the bank is above high water, and the post marking the point is placed quite close to the bank. Aug. 16th. 1871

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[fol. 37] I certify that the foregoing record is a true and faithful statement of the survey of that portion of the former Creek boundary, situated on the North Fork of the Canadian River, also of the computation used to determine the position of the line dividing the former Creek country into two equal portions, also the survey of the dividing line itself, extending from a point on the Canadian River, due North to the Cherokee Boundary in latitude 36° 8′ 42″ a distance of 85 miles and 156 feet.

I also certify that the work has been executed according to the instructions received from the Indian Office.

Frederic W. Bardwell.

STATE OF KANSAS,
Douglas County, ss:

Frederick W. Bardwell being first duly sworn deposes and says that the matters and things contained in the foregoing certificate are true.

Frederic W. Bardwell.

Sworn to and subscribed before me the 4th day of January A. D. 1872. John G. A. Norton, Notary Public.

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STATE OF KANSAS,
Douglas County, ss:

On this day of September A. D. 1871, personally appeared before me a Notary Public in and for said County and State. John F. Smith, Gilbert Plank, William Patridge, I. P. Devine, J. F. Ewing, P. C. Bailey and James P. Cassedy, who being first duly sworn according to law depose and say that they assisted F. W. Bardwell Civil and

Topographical Engineers in Surveying the boundary of the Creek Country, that lies along the North Fork of the Canadian River. And afterwards assisted in surveying the line of Division of the Creek Country into two equal parts. And according to the best of our knowledge and belief the surveying was in all respects faithfully and carefully executed.

[fol. 38] John F. Smith, ax man; Gilbert Plank, Flagman; J. P. Divine, Chain-man; John F. Ewing, Ax man; P. A. Bailey, Chainman; Jas. P. Cassedy, 1st Flagman; Wm. Partridge, Clagman.

Sworn to and Subscribed before me this 26th day of September A. D. 1871. John N. Norton, Notary Public.

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COPY

Department of the Interior
Washington, D. C.

February 5th 1872.

SIR:

I have received your letter of the 2nd inst. submitting field notes of the survey of the Western boundary of the Creek Country and agreeably to your recommendation they are approved and herewith returned.

Very Respectfully, Your Obedient Tenant (s.) C. Delano, Secretary.

Hon. F. A. Walker, Commissioner of Indian Affairs.

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[fol. 39] EXTRACTS FROM FIELD NOTES OF NATHANIEL ROBBINS

(Defendant's Exhibit "A")

Survey of a part of the North and West Lines of Seminole Reservation commenced October 23rd 1871 at a post in mound on South Bank of North Fork in Line of Division of Creek Lands.

On the Meandering of North Fork the Column marked "Bearing" contains the true Bearing, the variation of needle being 10° East. The Distance is expressed in Chains and hundredths of a chain.

Double Distances Northings. Southings Eastings and Westings are expressed in Chains and fractions of chains with decimal carried to four places.

Double Areas are expressed in Square Chains and fractions with decimals carried to three places.

Page 1

Meandering of North Fork Commenced Oct. 25th 1871

Station	True Bearing	Distance	Northing	Southing	Easting	Westing	Double Distance	Double Areas
No. 1	N. 53 W.	34.90	21.0033			27.8724	+21.0033	+585.412
2	S. 84 W.	6.82		0.7128		6.7826	+41.2938	+280.079
3	S. 57 W.	7.33		3.9922		6.1474	+36.5888	+224.926
4	S. 69 W.	9.81		3.5156		9.1584	+29.0810	+264.807
5	S. 15 W.	29.50		28.4948		7.6352	− 2.9294	− 22.366
6	S. 75 W.	9.87		2.5545		9.5336	−33.9787	−323.939

* * * * * * * * *

Page 2 and 3

[fol. 40]

* * * * * * * * *

Total Westing of Meandering line in Chains	708.0201	
Distance from 35th parallel North to first Station in Meandering course in Chains Per Bardwell's Survey	2,256.61	
Area of Parallelogram between Base line of Meandering of North Fork and 35th Parallel in Acres		159,773.209
Area between 35th parallel and Meandering of Canadian River as per Bardwell's Survey in Acres		37,429.497
Total Area Seminole Reservation		200,000.003

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STATE OF KANSAS,
Douglas County:

On this 28th day of November A. D. 1871 Personally appeared before me a Notary Public in and for said County & State John F. Smith, Gilbert Plank, John F. Ewing, Charles Lamb and William Partridge, who being first duly sworn according to Law depose and say that they assisted Nathaniel Robbins Civil & Topographical Engineer, in surveying the North & West Boundaries of the Reservation of the Seminole Indians in the Indian Territory, and according to the best of their knowledge and belief the said surveying was in all respects faithfully correctly and carefully executed.

John F. Smith, Chairman; Gilbert Plank; John T. Ewing; Wm. Partridge.

Sworn to and subscribed before me this 28th day of November A. D. 1871. John G. A. Norton, Notary Public.

[fol. 41] Washington, March 26, 1940.

Re *Seminole Nation* v. *United States*, No. L-208

Court of Claims

The Honorable, The Attorney General.

My Dear Mr. Attorney General:

I have received your letter dated February 23 (90-2-20-53) signed by Norman M. Littell, Assistant Attorney General, relative to the above-styled case and requesting a supplemental report setting forth all facts which appear to be pertinent to the issues involved. You refer particularly to the statements made in a letter dated March 17, 1936, from the General Land Office to Paul M. Niebell, attorney for the Seminole Nation.

The quoted portion of the report of the Secretary of the Interior dated February 2, 1931, beginning with the words "for the purpose of computing the area subdivided by the Geological Survey * * *" is a verbatim copy of an informal memorandum dated May 21, 1930, which was prepared in the General Land Office from the official records at the verbal request of the attorneys representing the Indians and based upon certain assumptions set forth by these attorneys at that time. This unsigned memorandum was not addressed to any one. The General Land Office letter of January 12, 1931, addressed to the Commissioner of Indian Affairs refers to the informal applications of the attorneys for the Indians for information as to the official records of the General Land Office and confirms the fact [fol. 42] that the memorandum of May 21, 1930, was turned over to them.

Neither the unsigned memorandum of May 21, 1930, the above-mentioned letter of January 12, 1931, office letters of June 1 and 19, 1935, addressed to Mr. Niebell, nor the report of the Secretary of the Interior are statements or findings of fact concerning the actual area of the 200,000-acre Seminole Tract by this Department. The memorandum merely furnishes an estimated area based on the assumptions of the attorneys which are not necessarily concurred in by this Department. In fact our investigation of the situation indicates that these assumptions are not valid.

As stated in the memorandum, the Bardwell line as retraced by Hackbusch in 1888 was protracted upon the plats

of the townships between the Canadian and the North Canadian Rivers. The claim that this protracted line is the correct position of the east boundary of the 200,000-acre Seminole Tract is based upon the assumption that the terminal corner on the right bank of the North Fork of the Canadian River in Sec. 25, T. 11 N., R. 6 E., as shown upon the plat approved January 13, 1898, is a correct restoration of the Bardwell terminal post. It must also be assumed in this connection that the record of the Hackbusch retracement which alleged to find only a few Bardwell corners, will correctly define the actual loc-tion of this boundary in relation to the township surveys.

The Creek dividing line as surveyed by Bardwell was never actually connected to the subdivisional surveys at the time the townships were surveyed. Consequently the assumptions made by the attorneys for the Indians upon which the alleged deficiency is based are not sustained by the official record.

In his letter of February 21, 1936, to the General Land Office, Mr. Paul M. Niebell, attorney, called attention to case L-208 in the United States Court of Claims involving a claim of the Seminole Nation for the value of 11,550.54 [fol. 43] acres of its national domain and stated that a memorandum of that office dated May 21, 1930, had been filed in the record of this case. In reply the Assistant Commissioner, by letter dated March 17, 1936, stated:

1. That the information furnished in the memorandum was an estimate based upon a certain protracted position of the dividing line;

2. That the estimated area of the tract under a second assumption which would be equally valid would be considerably larger;

3. That both estimates are subject to the objection that they are based upon the subdivisional surveys executed in 1897-98, many years after Bardwell and Robbins meandered the two forks of the Canadian River, with the possibility of substantial changes in the channels of these streams during the period from 1871 to 1897.

With reference to the four questions listed on page 2 of your letter, the following statements are submitted:

1. The records of the General Land Office do not show that the Robbins survey of the Seminole Tract of 200,000

acres approved February 5, 1872, failed to include 200,000 acres.

2. The records of the General Land Office do not show the actual location of the line run by Bardwell in 1871, from the Canadian River to the north fork in relation to the rectangular system of surveys executed by the Geological Survey in 1897-98. The Bardwell line was not identified and connected to the rectangular subdivisional surveys.

3. The records of the General Land Office show that Henry C. F. Hackbusch in making the survey of the 175,000-acre tract of land purchased by the United States from the Creek Nation under the agreement of February 14, 1881, stated in his field notes that he retraced the Bardwell dividing line, [fol. 44] finding only a few of the Bardwell corners and the alinement quite irregular. There is a conflict between the record of the survey of the Creek Dividing Line by Frederic W. Bardwell in 1871, and the record of the retracement of this line by Henry C. F. Hackbusch in 1888. Both are official records and entitled to the same presumption of correctness. However, the original Bardwell record is consistent with the record of the Robbins survey of the North Fork of the Canadian River projected east from the identified Robbins northwest corner of the Seminole Reservation.

4. The records of the General Land Office do not show that the lands comprising 11,550.54 acres of alleged deficiency have been erroneously omitted from the Robbins survey of the 200,000-acre Seminole Tract. On the contrary, these records show that the area of the tract in question as surveyed by Bardwell and Robbins to be 200,000 acres.

A diagram has been compiled from survey records in this Department, showing the 200,000-acre Seminole Tract as surveyed by Bardwell and Robbins superimposed on the official rectangular system of surveys. Attention is called to the fact that the northwest corner of the tract as established by Robbins was recorded and reestablished by the Geological Survey in 1897. From this corner the Robbins record of the meander of the north fork was projected easterly a distance in departure of 708.02 chains to the Bardwell dividing line and south to the Canadian River. The dividing line and meanders of the Canadian River are shown according to the record of the Bardwell survey of 1871, the

southeast corner of the tract being placed at the distance of 20 miles and 64.43 chains east of the meridian of the mouth of Pond Creek. A blue print of this diagram is enclosed. Certified copies of all correspondence in the case will be sent you as promptly as possible.

Sincerely yours, (Signed) Oscar L. Chapman, Assistant Secretary.

[fol. 45] December 23, 1940.

The Honorable, The Attorney General.

SIR:

In the case of The Seminole Nation v. The United States, No. L-208, Court of Claims, please refer to the letter dated March 26, 1940, in reply to your letter dated February 23 (90-2-20-53), requesting a report on the information that is supplied by the surveying records.

Herewith is a letter dated October 31, 1940, addressed to this Department, from Mr. Paul M. Niebell, Attorney for the Seminole Nation, insisting upon a review of certain points that are set out in the letter of March 26. This has been done, and by letter today I am stating to Mr. Niebell that the doubts can be cleared only by a thorough field examination.

The question which concerns the attitude of the General Land Office is as to the true location on the ground of the Bardwell boundary of 1871, and whether the initial or northeastern corner of the Seminole tract of 200,000 acres, as surveyed by Robbins immediately after the boundary was established, was, as intended, actually in agreement with the Bardwell boundary.

The field-note record of the Robbins survey, approved February 5, 1872, is satisfactory in itself, and leaves no doubt of the inclusion of the full 200,000 acres within the Bardwell and Robbins lines.

The point of the dates of the Bardwell and Robbins surveys is regarded as important. Bardwell began on August 16, 1871; he reached the North Fork of the Canadian River on August 22; he established a marker on the bank of that stream, then continued north on the Creek dividing line. Robbins began his survey on October 23, 1871, commencing at the marker just mentioned. The Robbins field notes call for the Bardwell marker, and there should have been no difficulty as to the identification.

It is presumed that the work of one was familiar to the other; advice and directions for locating the Bardwell [fol. 46] boundary would have been furnished to Robbins, possibly an assistant who knew the line, or a guide; the marks on the trees and the cutting of the undergrowth would be fresh, and readily noticed. The two men were unquestionably in contact during the preparation of their field-note records. The Bardwell field notes were sworn to before a Kansas notary public on January 4, 1872; the Robbins field notes were sworn to before the same notary on the following day.

The retracement of the boundary by Hackbusch, in 1888, is not regarded as conclusive; these field notes do not supply adequate proof of the identification of the boundary.

The position of the Hackbusch line is shown on the township plat, in sec. 25, T. 11 N., R. 6 E.; there is no separate representation of the Bardwell line. It is exceedingly important to note that the Hackbusch location is at the north point of the bend of the river; then, note the first two courses of the Robbins meander line of this bank; (1) N. 53° W., 34.90 chs.; and, (2) S. 84° W., 6.82 chs. The Robbins turning point from the first to the second meander course was evidently very near the Hackbusch point. When this physical condition is taken into consideration, the Robbins initial point, on the Bardwell line, would be placed downstream, or to the southeast, at least the whole length of the first course of the meanders, or an easting of at least 28 chs. from the Hackbusch point.

The Robbins meander courses cannot be laid off from the Hackbusch point, as the courses would lead directly away from the river bank. If Robbins had inadvertently started at a point too far down stream, he could not have failed to note the error when turning at the bend of the river, where Hackbusch placed the Bardwell line, as the Bardwell marks would have been very plain at that time.

The Hackbusch monument on the North Fork of the Canadian River, at the point above mentioned, was placed there on August 25, 1888, at the time of the survey of the 175,000 acre tract, which is situated to the east of the [fol. 47] Creek dividing line. On August 26, Hackbusch began the meanders of the river, running the courses downstream, beginning at the marker which he placed there. The first two courses are recorded as follows: (1) S. 79¼°

E., 6.00 chs.; and, (2) S. 51¾° E., 30.00 chs. These two courses are almost the equivalent of the Robbins first meander course, given above. By Robbins, north 21.00 chs.; and west 27.87 chs.; when reduced to the equivalent northing and westing, running upstream. The first two courses of Hackbusch, south, 19.59 chs.; and east, 29.53 chs.; when similarly reduced, running downstream.

If Hackbusch had noted the impossibility of laying off the Robbins meander courses upstream from the Hackbusch point, and the striking agreement in the position of the river bank downstream, as shown above, it would have been ample warning of the danger of an overlap. This deduction from the field-note record, at the North Fork of the Canadian River, places the west boundary of the Hackbusch 175,000-acre tract to the west of the east boundary of the Robbins 200,000-acre tract a distance of 28 chs., more or less, as nearly as the comparison can be made in this manner.

Another test, readily made, is to compare the recorded field note distance, 20 mi., 64.43 chs., easterly from the mouth of Pond Creek to the meridian of the Bardwell line. The outlet of Pond Creek is in sec. 9, T. 5 N., R. 3 E. The distances along the east and west section lines, as shown on the township plats, give a total of 21 mi., 6.00 chs., to the eastern boundary of T. 5 N., R. 6 E.; by this calculation, the Bardwell boundary would be located 21.57 chs. west of the east boundary of the township at the Canadian River. The east boundaries of Tps. 5 to 11 N., R. 6 E., are along a meridian excepting for an offset, 4.06 chs. to the west, where crossing the standard parallel from T. 8 N., R. 6 E., to T. 9 N., R. 6 E.; by this comparison, the Bardwell boundary would be located 17.51 chs. west of the [fol. 48] east boundary of the township at the North Fork of the Canadian River. This location comes into an intermediate place between the Hackbusch point and what had been shown as the beginning point on the river bank for the Robbins meander courses. In making such comparisons over long distances, some allowances must necessarily be made for minor discrepancies in the directions and lengths of lines.

Before accepting the Hackbusch location the General Land Office recommends that a careful retracement be made based upon the Hackbusch record, including a thorough search for additional marks, if any, along that line. A

similar retracement along the line indicated by the Bardwell field notes is needed also.

By the usual rules the original marks of the Bardwell line will be controlling, so far as such evidence can now be recovered; the Bardwell field-note record courses and distances will govern the restoration of such portions of the line as may not now be marked on the ground, excepting as the method of single proportionate measurement will apply at intermediate mile stations where the marks are now lost.

It is understood that the Seminole case was set for trial on a recent date, but that a short extension was granted on motion by Mr. Niebell in order to afford the time for a review of the surveying records. The additional question follows as to whether or not the parties to the suit may elect to request a further extension so as to allow the time for a thorough field examination.

In his current letter Mr. Niebell complains that the reference in the letter of March 26 to the Paine memorandum "implies that the conclusions contained therein were directed by the attorneys." No such construction was intended. On that point, it is evident that Mr. Paine was well aware of the incompleteness of the Hackbusch field notes, their questionable value as proof of the location of the Bardwell boundary, and consequent doubt as to whether or not Hackbusch might have been the one in error, rather than Robbins.

The explanations in the letter of March 26, were intended [fol. 49] to make these point- clear; the further review shows the necessity for that caution.

Very truly yours, (S.) E. K. Burlew, First Assistant Secretary.

[fol. 50] EXTRACTS FROM HACKBUSCH FIELD NOTES

July 31, 1888

"Begin at the initial monument on the Creek Dividing Line and left bank of Canadian River, which is a cedar post 6 ins. square, set firmly in, and 4½ ft. above ground, marked: Seminole on west and Creek on east faces, from which

"A post oak, 24 ins. diam., bears S. 86½° E., 43 lks. dist., marked thus: X

A post oak, 16 ins. diam., bears S. 48° W., 56 lks. dist., marked thus: X"

"In extending this line 4 miles north and making diligent search in all directions, I was unable to find any trace of corners and of a surveyed line.

"At a distance of 3 miles 68.70 chs., and 16.15 chs. east of this line, Thomas Factor, my guide, showed me the place, where the Bardwell 4th mile corner had been established. The post for corner is missing, but the bearing trees are standing, and agree with the original field notes, or as near as old bearing trees generally do agree, making due allowance for error, and difference in instruments and variations.

"At the point indicated by the bearing trees, I made search for remains of old post, and found small pieces of an oak post on the side of the hole where the same had been planted.

From this point the two bearing trees bear as follows, viz:

"A post oak, 12 ins. diam., bears N. 60° W., 60 lks. dist.
A post oak, 30 ins. diam., bears S. 27½° E., 30 lks. dist.

"Mr. Bardwell, in taking these bearing trees, did not set off any variation, or allow for any, on his instrument."

August 1, 1888

"I now run a blank line from the Bardwell 4th mile corner to the initial point on the Canadian River.

"S. 2° W., on a blank line. Va. 9° 30′ E.
At 3 miles and 68.70 chs. to initial monument.
I found no blazed line nor corners.

"I am satisfied that the cedar post on the north bank of the Canadian, marked Seminole on west and Creek on east faces, is the initial point of the Creek Dividing Line, and [fol. 51] established by Mr. Bardwell. The statement of Thomas Factor and another Seminole, who were present at the time when Mr. Bardwell set the corner, which Gov. Brown corroborates, is sufficient proof. Further, the cedar post shows that it has been there fully 15 or 16 years. The description of the same and that of the bearing trees, together with the marking, agree with the Bardwell field notes."

August 2, 1888

"This 4th mile falls short 11.30 chs. of being 80 chs. or a full mile. I am satisfied that no line was ever surveyed and measured from the initial to the 4th mile corner, and by what means it was established is an enigma to me."

August 16, 1888

"The 40th mile corner is a Post Oak, 12 ins. diam., marked (with a common knife) XL M on west face, from which

"A black oak, 12 ins. diam., bears N. 86° E., 70 lks. dist.
A dead post oak, 6 ins. diam., bears S. 16½° E., 50 lks. dist.
A post oak, 10 ins. diam., bears N. 46° E. 124 lks. dist.
All trees are marked alike, with a cross, thus: X.

"No magnetic variation was allowed. The bearing trees do not exactly agree with the field notes, but come as near to it as Mr. Bardwell's survey generally comes of being correct."

August 17, 1888

"South, on 39th mile. Va. 8° 50′ E.
"79.40 chains: To a point 520 lks. west of an old oak post, 4 ins., square, marked XXXVIII M. (The marking is done with a common knife) from which

"A post oak, 18 ins. diam., bears S. 17½° W., 99 lks. dist., marked with a cross (X).
A post oak, 11 ins. diam., bears N. 84½° E., 60 lks. dist., marked thus: X.
A post oak, 13 ins. diam., bears N. 23° W., 20 lks. dist., marked with a cross, thus: X.
"This being the 38th mile corner."

"There is a discrepancy of 54.55 chs. in the Bardwell measurement between the 4th and 38th mile corner."

[fol. 52] August 25, 1888

"The old line (run by Bardwell) is very poorly surveyed, if it ever was surveyed. It is my opinion, the country being very rough and very difficult to travel over, that the old Rankin line was used as an auxiliary to establish an occasional corner between the two rivers. It is evident that no

line was blazed and marked. This is verified by the statements of Gov. J. F. Brown, Thomas Factor, Daly David, and John Stepny. The two latter are old Seminole Negroes of more than ordinary intelligence, and told me that no corners were ever found on the Bardwell line between the 4th mile corner and North Fork of Canadian by anyone. The Bardwell survey through the Seminole lands seems to be considerable of a myth."

* * * * * * *

From the initial monument of Creek Dividing Line on the north bank of the Canadian River, I run North 2° E. along the 1st mile.

Va. by Burts improved Solar Compass 9° E. (Chains) Leave first bottom, & enter second, bears 9.70 E. and W.

* * * * * * *

[fol. 53-54] EXTRACT FROM A LETTER OF ACTING ASSISTANT COMMISSIONER OF THE GENERAL LAND OFFICE TO THE COMMISSIONER OF INDIAN AFFAIRS, DATED JANUARY 12, 1931

"In reply to your letter (L-O&G, 31152-1930) dated January 5, 1931, you are advised that upon informal applications by the attorneys representing the Seminole and Creek Indians for certain information, there were turned over to them certain informal memoranda quoted in your letter as the result of investigation of the official records (1) relating to the areas actually included in the 200,000-acre tract granted to the Seminoles for a reserve by the act of March 21, 1866 (14 Stat., 755), and the additional 175,000-acre tract purchased from the Creeks for the Seminoles adjoining the east side of the 200,000-acre tract, under these provisions of the act of March 3, 1873 (17 Stat., 626): * * *

"The data upon which the memoranda were based have been reviewed, and the conclusions contained therein are hereby confirmed as follows:

"Memorandum dated May 21, 1930:

"Seminole Tracts:

"For the purpose of computing the area subdivided by the Geological Survey of the lands in the two portions constituting the Seminole Lands, the terminal corner of the

Creek Dividing Line on the south or right bank of the North Fork of the Canadian River was used as a point of control, from which the Bardwell line as retraced by Hackbusch in 1888 was laid down to the north or left bank of the Canadian River. This covers a distance of 34 miles 37.70 chs., and from this division line as thus defined, it is found that west thereof, there were actually included in the 200,000-acre tract 188,449.46 a. or a deficiency of 11,550.54 a. East of said line there were actually included in the 175,000-acre tract 177,397.71 a., or an excess of 2,397.71 a., leaving a net deficiency in the two tracts of 9,152.83 a."

AGREEMENT OF COUNSEL AS TO RECORD

Agreed to: December 8, 1941.

Paul M. Niebell, Attorney of Record for Plaintiff.

Norman M. Littell, Assistant Attorney General for Department.

R. T. N.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 16, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is assigned for argument immediately following No. 348. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 31 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 830

THE SEMINOLE NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PAUL M. NIEBELL,
C. MAURICE WEIDEMEYER,
W. W. PRYOR,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 830

THE SEMINOLE NATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Seminole Nation of Indians prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on May 5, 1941.

Opinion Below.

The opinion of the Court of Claims is not yet reported (R. 6-9).

Jurisdiction.

The judgment of the Court of Claims was entered on May 5, 1941 (R. 9). Motion for a new trial was overruled on October 6, 1941 (R. 10). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 299, 43 Stat. 936, 939 (Section 288 of the Judicial Code as amended, 28 U. S. C. A. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statutes Involved.

The special jurisdictional act, approved May 20, 1924, c. 162, 43 Stat. 133, provides in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."
>
> * * * * * * *
>
> "Sec. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation * * *"

The Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provides in part as follows:

> "The Court of Claims is hereby directed to consider and to offset against any amount found due to said tribe or band all *sums* spent gratuitously by the United States for the benefit of said tribe or band * * *"

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides in part as follows:

> "That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Act * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence

heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended. * * *"

The Act of May 22, 1939, c. 140, 53 Stat. 752, provides as follows:

"In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect as if the cause had been brought here by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that

there is a failure to make any finding of fact on a material issue."

Questions Presented.

The questions presented are as follows:

1. Whether the Seminole Nation is entitled to recover just compensation for 10,351.82 acres of its lands, held by it in fee simple, which were inadvertently excluded from its domain by an erroneous survey made by an officer of the United States and subsequently patented by the administrative officers of respondent to white settlers and other Indians—which patents were confirmed by the failure of the United States to cancel them after a full knowledge of said errors.

2. Whether fee simple title to the 200,000 acres of land, described in the Treaty of March 21, 1866, passed by grant *in praesenti* to the Seminoles, by the terms of said Treaty of March 21, 1866, 14 Stat. 755.

3. Whether an erroneous survey would divest the Seminole Nation of title to its lands granted in fee simple by said Treaty of March 21, 1866.

4. Whether by the rules of this Court or by the rules of the Court of Claims or by statute, the Court of Claims is required to make findings of fact on pertinent and material issues of fact.

(a) Whether in the findings of the lower court the recital of an allegation in the pleadings on a material issue of fact complies with the rules of this court and the statutes requiring the lower court to make findings of fact.

(b) Whether the statement in the Court of Claims Findings of Fact that "It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54

acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others," is or can be considered as a proper finding of fact on the material issues of (1) the amount of the acreage erroneously excluded by the survey; (2) how the plaintiff became dispossessed; (3) the manner in which plaintiff's lands were taken; (4) by whom plaintiff's lands were taken; (5) the date of the taking; and (6) by what method plaintiff's lands were granted.

5. Whether an item of gratuity offset, which the Court of Claims has allowed the United States in one case, can later be used another time and in a subsequent case to defeat the claim of petitioner in the subsequent case.

In other words, is the United States entitled to have more than one allowance for the same item of gratuity offset?

6. Whether the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, which authorizes the Court of Claims to consider and offset "*sums* expended gratuitously by the United States for the *benefit*" of an Indian tribe, permits the court to use lands rather than "*sums*" as a gratuity offset.

Statement of the Case.

The material facts of this case are set forth as follows:

By the terms of the Treaty of March 21, 1866, 14 Stat. 755, the United States granted to the Seminole Nation a national domain of 200,000 acres of land. Art. III of said Treaty provides in part as follows:

> "The United States having obtained by grant of the Creek Nation the westerly half of their lands, *hereby grant to the Seminole Nation* the portion thereof hereafter described, which shall constitute the national do-

main of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to-wit: Beginning on the Canadian River where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866 (June 14, 1866), following said line due north to where said line crosses the north fork of the Canadian River; thence up said north fork of the Canadian River a distance sufficient to make two hundred thousand acres by running due south to the Canadian River to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of One Hundred Thousand ($100,000) Dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written." (Italics ours.)

The Creek "dividing line" under the Creek Treaty of June 14, 1866, 14 Stat. 785, was established by Frederick W. Bardwell in 1871, and was approved by the Secretary of the Interior on February 5, 1872. This Bardwell line became the east boundary of the new Seminole National domain granted to the Seminole Nation by the United States under said Seminole Treaty of March 21, 1866, and constituted the base from which the true west line of the Seminole 200,000 acre treaty tract was to have been established (R. 7).

In 1871, and within two months after the survey and running of the Creek "dividing line" by Frederick W. Bardwell, the respondent employed one Nathaniel Robbins to run the western boundary line of this 200,000 acre tract which the respondent had granted to the Seminole Nation under the said Treaty of March 21, 1866, 14 Stat. 755. This survey was completed in 1871 and was approved by the Secretary of the Interior on February 5, 1872. Ac-

cording to *Robbins' calculations* the number of acres included between the Canadian River on the south, the north fork of the Canadian River on the north, the Bardwell line on the east and the Robbins' line on the west, was 200,000.03 (R. 7).

By Treaty of February 27, 1867, 15 Stat. 531, between the Pottawatomie Indians and the United States, said Pottawatomies were authorized to select a suitable location for the exclusive use and occupancy of said tribe in Indian Territory, said location to be made "without interfering with the locations made for other Indians."[1] Accordingly said Pottawatomie Indians selected lands immediately west of and adjoining said Seminole National Domain.

In 1881 the Seminole Nation acquired a tract of 175,000 acres of land east of and contiguous to the 200,000 acre treaty tract. The history of the acquisition of said 175,000 acre tract is hereinafter set forth. This tract, together with the 200,000 acres acquired by said Treaty of March 21, 1866, should have constituted a domain of 375,000 acres.

In 1897 and 1898 the combined Seminole domain was sectionalized by the United States Geological Survey and it

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[1] In its Finding 4 the lower court stated that the Pottawatomies were "granted" lands immediately west of the Seminole Domain. Let us point out to the Court that no "grant" was made to the Pottawatomie tribe. The Pottawatomie Treaty of February 27, 1867, 15 Stat. 531 (Art. I) contains no such grant, but merely authorizes the Pottawatomie Indians to locate in Indian Territory, and

> "To select, if possible, a suitable location for their people without interfering with the locations made for other Indians."

In the letter of Acting Commissioner of Indian Affairs to the Secretary of the Interior dated May 17, 1887 (Sen. Doc. No. 64, 51st Congress, 2nd Sess., p. 3) it is stated:

> "March 16, 1872, the Secretary of the Interior decided that the land selected by the Pottawatomies under the Treaty of 1867 could not be conveyed by Patent to the Nation, for the reason that as all the members of the tribe had become citizens the nation had become extinct."

then, for the first time, became apparent that the combined areas of the Seminole tracts were deficient to the extent of some 9,135.57 acres. On January 17, 1900, the Principal Chief of the Seminole Nation wrote to the Commissioner of Indian Affairs as follows (R. 19).

> "By an error made by the United States Surveyors in establishing the boundary of said tracts, there was, as a matter of fact, set apart to the Seminole Nation only 365,864.43 acres, leaving a deficit of 9,135.57 acres."

In said letter the Principal Chief also requested the Respondent to correct the error and give the Seminole Nation the lands to which it was entitled (R. 19).

On February 5, 1900, the Commissioner of Indian Affairs, in his communication to the Secretary of the Interior, reviewed the history of this matter and stated in part as follows (R. 20):

> "The recent surveys in the Indian Territory made by the Geological Survey show that the total area included in the Seminole Nation is 365,864.43 acres, as stated by Governor Brown."

The errors of Robbins in surveying and establishing the west boundary of the Seminole 200,000 acre tract was further recognized by the officials of the respondent. On October 16, 1900, Acting Secretary F. L. Campbell wrote to the Commission to the Five Civilized Tribes, and after reviewing the facts, stated in part as follows (R. 22):

> "* * * but said surveys appear to indicate several hundred acres in excess of 175,000 acres, which shows that if error existed in the total area its cause will be found in the 'crooked west boundary' of the 200,000 acres west of the 'dividing line' or in the incorrect location of the 'dividing line' itself * * *."

The west line of the Seminole 200,000 acre tract, as surveyed and established by Nathaniel Robbins in 1871, was

in error; and the said tract of 200,000 acres contained an area of 189,648.18 acres (R. 16). As a consequence of this error, 10,351.82 acres of Seminole National domain granted to the Seminole Nation in said Treaty of March 21, 1866, had been erroneously and inadvertently excluded from the Seminole National Domain, and included in the Pottawatomie reservation located immediately west of said Seminole domain, and the United States had allotted and patented said 10,351.82 acres either to Pottawatomie Indians or white settlers pursuant to the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026, and turned the purchase price into the United States Treasury as public money. Thereafter said Seminole lands have been held by the grantees adversely to the petitioner (R. 16, 7).

Although as early as 1900 the respondent had knowledge or ample means of knowledge of these errors made by its administrative officers, yet respondent took no steps to correct them and by its inaction it confirmed said erroneous disposals and patents, as of the date of their issuance. Therefore, we submit that the petitioner is now entitled to just compensation for the taking of said lands.

In the lower court the respondent, defendant below, took issue with us on the facts, contending that the area of the Seminole tracts was computed from an erroneous location of the Creek "dividing", or Bardwell line, and relied upon the Bardwell field note record, and certain distances set forth therein.

The petitioner, plaintiff below, relied upon the location of the Bardwell line as identified, relocated on the ground and reestablished by H. C. F. Haekbusch, a surveyor of the General Land Office, in 1888 (R. 15).

While the case was pending before the lower court the Department of Justice, with the consent of petitioner's counsel, requested the General Land Office to make a field

examination with respect to the true location of the Creek "dividing" line, as established by Bardwell in 1871, and the lines of certain later surveys that were related thereto in connection with the controversy involved in this case (R. 10-11).

This investigation was made by Arthur D. Kidder, District Cadastral Engineer, of the General Land Office.[2]

The report of Mr. Kidder, dated March 8, 1941, shows conclusively that the Robbins survey of the west boundary of the Seminole 200,000 acre treaty tract and his computation of the area were in error. In discussing this survey, Mr. Kidder states (R. 12):

> "It appears very evident, after a thorough field examination, that Robbins began his survey at a point that was not in agreement with the dividing line, and that the area which is actually included within the tract boundaries is much less than 200,000 acres.
>
> "There are several factors that contribute to the discrepancy in area: (1) The beginning point was east of the dividing line; (2) The Robbins meander courses are not correct as to their direction from true north; and (3) the length of the Bardwell east boundary, from north to south, is very much less than the distance that is given in the field notes."

Kidder further states (R. 14):

> "The actual length of the west boundary of the 200,000 acre tract, between the rivers, as taken from

[2] Mr. Kidder has had some forty years experience in this field of engineering work, and was Commissioner of this Court to settle boundary disputes in *Oklahoma* v. *Texas*, 272 U. S. 21, 273 U. S. 93, and *New Mexico* v. *Colorado*, 267 U. S. 30, 268 U. S. 108. Both parties were indeed fortunate to have had the benefit of the wide experience of Mr. Kidder in straightening out these old surveys of the Seminole lands. Strange to say, however, after the Kidder report was submitted to the General Land Office, although the Government requested this field examination, its counsel refused to file it as evidence in the case, and it became the duty of petitioner to do so.

the township plats, is 28.86 chains (1905 feet) *greater* than the Robbins field note record distance.

"As a consequence of the above known discrepancies it is impracticable to adjust the Robbins lines to secure a closure for the computation of the enclosed area. The showing is made that the tract contains 200,000 acres, but the calculation cannot be verified. It is necessary to abandon the Robbins record and take the directions and lengths of lines as these are found on the ground;"

The report also sets forth a full account of the survey of the retracement of the Creek "dividing" line, or Bardwell line, made in 1888 by H. C. F. Hackbusch, a surveyor of the General Land Office, and sets forth the fact that Hackbusch found some of the old corners set by Bardwell on the ground, and ran a line retracing the Bardwell line, through these identified corners (R. 14-16). The area in the Seminole 200,000 acre tract between the Bardwell line as retraced by Hackbusch, and the Robbins west line, and the north and south Canadian Rivers, was 189,648.18 acres, or 10,351.82 acres short of the 200,000 acres granted to the Seminoles by the Treaty of March 21, 1866 (R. 16).

Even though the lower court had this evidence before it yet it failed to make a definite finding as to the Seminole acreage erroneously excluded from the Seminole 200,000 acre tract by the Robbins survey, and included in the Pottawatomie Reservation.

In its Finding 4 the lower court said (R. 7):

"It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54 acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others."

The lower court failed to find as a material fact that there was an actual deficit of 10,351.82 acres in said tract, as

shown by the Kidder report. This seemed strange to us in view of the holding of the lower court in *The Creek Nation* v. *United States*, 93 C. Cls. 561 (decided on the same day the case at bar was decided), settling this identical question that the *true Bardwell line location* was that which was reestablished by Hackbusch in 1888, and that the Hackbusch retracement line was the point from which to make the computation of the acreage in that case.

Specification of Errors to be Urged.

The lower court erred:

1. In failing to find from the evidence submitted the amount of acreage of petitioner's lands excluded by the erroneous Robbins survey of the west boundary and thereafter patented to white settlers and individual Pottawatomie Indians.

2. In failing to make definite findings of fact, as to when the respondent took plaintiff's lands, and the amount of petitioner's lands taken by the respondent.

3. In failing to find and hold that the petitioner was divested of its fee simple title to 10,351.82 acres, which were part of a definitely described 200,000 acre tract, acquired by grant *in praesenti* in the Treaty of March 21, 1866, when patents thereto were issued by respondent pursuant to the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026.

4. In holding that under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, it had jurisdiction to offset land against land, without first definitely determining the amount due petitioner for its land taken by respondent, or the actual amount of the gratuity element in the land claimed by respondent as an offset.

5. In holding that under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, it could use land as an offset, rather

than the actual "sums" expended for the land claimed by respondent as an offset.

6. In finding and holding that the 175,000 acre tract, which respondent turned over to the Seminole Nation, constituted an element of gratuity.

7. In failing to find definite values of the respective elements of "gratuity" and "reparation" in connection with the 175,000 acre offset claim of respondent.

8. In failing and refusing to allow just compensation for 10,351.82 acres of its lands, held by it in fee simple, and taken from petitioner by patents inadvertently issued thereon, pursuant to said Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026, which patents were confirmed by the United States through its failure to place the Seminole Nation in possession of its lands after a full knowledge of the facts.

9. In holding that, after having allowed respondent an offset for the 175,000 acre tract in case No. L-51, *The Seminole Nation* v. *United States*, 93 Ct. Clms. 500, 525, it could again and for a second time allow the respondent another offset, in this case, for the same tract of land.

Reasons for Granting the Writ.

1. The lower court failed to follow the plain rules laid down in the decision of this Court in the case of *United States* v. *Creek Nation*, 295 U. S. 103.

2. The lower court has misconstrued and misapplied the Act of August 12, 1935, c. 508, 49 Stat. 571, 596. This act authorizes the court to consider and offset "*sums*" expended gratuitously by the United States for the "benefit" of an Indian tribe. Thus, this act permits the offset of money only. As can be noticed from a reading of the decision of the lower court, the *sums* paid by the respondent

for the land claimed by it as an offset were not offset against petitioner's claim; but, on the other hand, the lower court, in this case, used other land itself as an offset to defeat the just claim of petitioner for just compensation for 10,351.82 acres of its lands appropriated by respondent, without determining the definite amount due petitioner for its lands, or the amount due respondent as an offset.

3. The decision of the lower court in this case was not unanimous. Mr. Chief Justice Whaley dissented.

4. The lower court failed to make findings of fact on the material issues in the case.

5. In this case the lower court again allowed the respondent a purported gratuity offset which it had previously allowed respondent in a prior case. In case No. L-51, *The Seminole Nation* vs. *United States*, reported in 93 C. Clms. 500, and which is now pending for decision in this Court, as case No. 348, the respondent was allowed an offset for the very item used by the lower court to defeat petitioner's claim in this case.

6. Because of the above errors in the decision of the lower court, petitioner has failed to receive for the lands owned by it in fee simple, and appropriated by the respondent, the just compensation guaranteed it by the Fifth Amendment to the Constitution.

BRIEF.

The lower court failed to apply to this case the rule laid down by this Court in *United States* vs. *Creek Nation*, 295 U. S. 103. In that case this Court held that where the lands of an Indian tribe are held by it in *fee simple title*, an erroneous survey excluding lands from the tribal domain and including them within the lands of another tribe, would not be a taking of these lands; but that when erroneous patents were issued by the administrative officers of the United States to homesteaders or to Indians of another tribe, and no action was taken by the United States to cancel said patents after a full knowledge of the errors, said inaction confirmed said patents as of the dates of their issuance, and a taking was created for which just compensation was due the tribe from the United States under the Fifth Amendment to the Constitution of the United States.

The Seminole Nation in the case at bar had acquired by purchase the 10,331.82 acres involved in this suit; and by said Treaty of March 21, 1866, the United States granted *in praesenti* to the Seminole Nation the fee simple title to these lands. Therefore, the *title* of the Seminoles was founded upon this Treaty, and could be divested only by voluntary cession or by a taking by the United States. See *New York Indians* v. *United States*, 170 U. S. 1.

By an erroneous survey made by Nathaniel Robbins in 1871, 10,351.82 acres of said lands were inadvertently excluded from the Seminole domain and included in the lands of another Indian tribe; and were thereafter patented to Pottawatomie Indians or white settlers under the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026, without the discovery of the error.

In 1896 and 1897, when the Seminole lands were sectionalized by the United States Geological Survey, the

errors became apparent. However, the erroneous patents already issued were permitted to stand, and further erroneous patents were thereafter issued, and no steps were taken by the United States to correct said errors, or to place the Seminole Nation in possession of its lands.

The facts are similar to those in the *Creek* case, and clearly the lower court erred in failing to apply the rule set forth by this Court in that case.

The sole reason for the failure of the lower court to apply the rule in the *Creek* case was that in view of the fact that the Seminole Nation had been given another tract of 175,000 acres of lands, it was not entitled to just compensation for said 10,351.82 acres as of the dates of the issuance of patents.

The lower court said (R. 8-9):

> "Plainly it cannot recover. Although there may have been this deficit, more or less, in the 200,000 acre tract the defendant was obligated to set apart for plaintiff, the plaintiff was compensated therefor fifteenfold by the addition to the reservation of 175,000 or more additional acres immediately to the east. The plaintiff was entitled to receive from the defendant only 200,000 acres, but it has in fact received at least 360,000 acres and, therefore, cannot complain that there was a small deficit in the original 200,000 acre tract agreed to be set apart to it."

In this holding the lower court erred in three respects:

1. The acquisition of the 175,000 acre tract by the Seminole Nation did not involve an element of gratuity, but constituted an element of reparation for the Government's own error.

2. That the 175,000 acres cannot be offset as land under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, which permits *sums* only to be offset against an Indian tribe.

3. That the lower court has already offset the amount paid by the United States for this tract in *The Seminole Nation* v. *United States*, 93 Ct. Cls. 500, and it cannot properly use the same item again to defeat the present claim of petitioner.

Petitioner's claim, as heretofore set forth, was clear, definite and certain; but the lower court instead of determining the question of respondent's liability on petitioner's claim and then offsetting any "sums" which the respondent may have had, mixed up petitioner's claim with an alleged claim of respondent for a purported gratuity offset on another and distinct tract of land of 175,000 acres. The acquisition by the Seminole Nation of said 175,000 acre tract depended upon an entirely different consideration, and had a separate and distinct history.

In order that the court may see how petitioner's claim was confused with this transaction, the history of said 175,000 acre tract is set forth as follows:

In the fall of 1866 the Seminoles were removed by the United States to what was believed to be their new national domain, and were encouraged by the United States to make immediate and permanent improvements thereon, and they thereafter occupied said lands. The officers of the Government assured them that they would be protected in their improvements (Finding 3, R. 7; Sen. Ex. Doc. No. 75, 47th Cong., 1 Sess., pp. 5; 7; Sen. Ex. Doc. No. 126, 51 Cong., 1 Sess., pp. 2, 3, 6, 9; R. 17-19).

After the Creek "dividing line" had been run, it was discovered that the Seminoles had, by error, been settled *in part* on lands retained by the Creeks. In the meantime the Seminoles had made *substantial* improvements on this land, and at that time the improvements which they had made were more valuable than the lands on which they were located. To remedy this situation, and to fulfill its

promises to the Seminoles—to protect them in their improvements—the respondent, on February 14, 1881, purchased from the Creek Nation 175,000 acres of land immediately east of the Creek "dividing line", as run by Bardwell, and added same to the original Seminole 200,000 acre tract without cost to the Seminole Nation. By Act of August 5, 1882, c. 390, 22 Stat. 257, 265, the amount of $175,000 was duly paid the Creek Nation for these lands. (*Creek Nation* vs. *United States*, 93 C. Cls. 561, 563; Senate Ex. Doc. No. 126, 51st Cong. pp. 2, 3, 6, 9; Sen. Ex. Doc. No. 75, 47th Congress, 1st Session, p. 6; Findings 5, R. 7-8; Rept. Comr. Ind. Aff., 1872, pp. 36-37, 241; R. 17-19).

In reporting on this purchase, and submitting a draft of the provision for inclusion in an appropriation bill Acting Commissioner of Indian Affairs, Thomas M. Nichol, wrote the Secretary on February 18, 1881, as follows (Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., Cong. Ser. 1989, p. 7):

> "As shown in the foregoing the homeless condition of the Seminoles and their unwelcome occupation of lands belonging to another tribe, as well as the necessity of settling them somewhere, as soon as possible in order to enable them to commence to support their families, led the Government to locate them on what, at the time, was supposed to be the land that would enure to them, when the 'dividing line' should be surveyed, but which upon the correct survey of that line was found to be included in the Creek reserve. That they were thus erroneously located is, under the circumstances, not to be wondered at, but certainly it was through no fault of the Seminoles and the Government should therefore pay the Creeks for the lands sought to be purchased, and should also meet the expense of the survey thereof. The Seminoles certainly should not be required to do this, especially when it is considered that they received only fifteen cents an acre for the country relinquished by them in the treaty of 1866, while the United States paid the Creeks thirty cents

> per acre for the half of their domain ceded to the United States, and then charged the Seminoles fifty cents an acre for the part of the same land sold to them, and only after the lapse of nine years made up to them the difference in price."

Thus, in refusing recovery in this case the lower court mixes up lands of the two entirely separate and distinct Seminole tracts, and disregards the fact that the 175,000 acre tract was given to the Seminoles to make good the error of the United States in settling them on the wrong land, and to make good its promise to protect the Seminoles in their improvements. Thus this transaction involved no element of gratuity but constituted an element of reparation in that had the Government moved the Seminoles off the Creek lands and paid them for their improvements, it would have cost the Government more to rectify its error than to buy the land and give it to the Seminoles.

The Lower Court Has No Jurisdiction to Offset Lands Against Lands.

The lower court has no jurisdiction to offset lands against lands, as it did in this case. The Act of August 12, 1935, c. 508, 49 Stat. 571, 596, permits "sums" only to be offset as gratuities. While the lower court's decision recognized this fact, yet it goes on to state as follows:

> "* * * Therefore, if the plaintiff be entitled to recover for any deficit in the 200,000 acre tract, the defendant would be entitled to an offset of the value of the acreage given them gratuitously. This value is far in excess of the value of whatever deficit there may have been."

Here again the lower court refuses to recognize the fact that the 175,000 acre tract was an element of reparation, and that it was not an element of gratuity. Furthermore,

it states that the value of the 175,000 acre tract "is far in excess of the value of whatever deficit there may have been." This conclusion is not supported by any finding of the value of the 10,351.82 acre deficit, as of the dates of the patents issued—the date of the taking by the United States.

Thus, without endeavoring to establish and find the values of the acreage involved in this suit as of the date of taking, the lower court summarily jumps to the conclusion that the 175,000 acre tract was of more value than the smaller acreage claimed, and without considering that the lands involved in the claim were not a part of said 175,000 acre tract, or that the date of taking was at a later date than the transaction with respect to the 175,000 acre tract.

The United States Is Entitled to Credit Just Once for an Item of Offset.

By the use of this 175,000 acre tract as a gratuity offset against petitioner, the lower court has used this same item of offset twice: in this case, and in the *Seminole Nation* v. *United States*, 93 C. Cls. 500. In said *Seminole* case the lower court allowed the United States a gratuity offset in the amount of $165,847.17 for said 175,000 acre tract. The right of the defendant to such an offset in that case is challenged by the petitioner in case No. 348 now pending before this Court. Notwithstanding this allowance, the lower court again uses the same item of offset in the case at bar, to defeat the claim of the petitioner for just compensation for the value of the 10,351.82 acres involved in this case. Thus we have an anomalous situation of the lower court's allowing the same item of offset twice, and in two different amounts and in two different ways. Clearly the lower court erred in again using this item as an offset in the case at bar.

The Lower Court Failed to Find the Material Facts.

Let us point out to the Court that the lower court failed to find the facts material to the issues involved in this case. For example, in Finding 4 the lower court stated (R. 7):

> "It is alleged that when the boundary of this tract came to be fixed, the area included was 11,550.54 acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff was dispossessed of said acreage and the same has been granted and is now held adversely by others."

We submit that this statement is not a proper finding as to whether or not the said 10,351.82 acres of Seminole Land were excluded from its domain and included within the Pottawatomie Reservation. This is merely a statement of the pleading and clearly is not a proper finding of fact. In *United States* v. *Henry*, 17 Wall. 405, 408, this Court held that a statement of the Court of Claims that the mustering officer "'alleged" that a company was below the minimum strength was not a proper finding of fact. We submit that the lower court should have found the fact with respect to the following material issues of fact:

1. Whether petitioner received fee simple title, *in praesenti*, to the 200,000 acres described in the Treaty of March 21, 1866, 14 Stat. 755.

2. The amount of acreage actually excluded from petitioner's 200,000 acre tract by the erroneous Robbins survey of the west boundary line in 1871.

3. The time when the errors of the Robbins survey of the 200,000 acre tract first became apparent to the officials of the respondent.

4. The time when the Seminole Nation first demanded the lands to which they were entitled, and requested respondent to correct the error.

5. The amount of acreage taken from petitioner and patented to white settlers and individual Pottawatomie Indians.

6. The amount, if any, of the element of gratuity present in the 175,000 acre tract claimed by the respondent as an offset.

7. The amount of the element of reparation present in the 175,000 acre tract.

8. The value of petitioner's 10,351.82 acres at the time of the taking.

From a study of the case of *United States* v. *Creek Nation*, 295 U. S. 103, it will readily be seen that this Court considered these facts material to the proper determination of that case. A mere glance at the lower court's Findings in this case (R. 6-8) shows the complete absence of the finding of these necessary facts.

Conclusion.

From the facts herein set forth, which are supported by the record before this Court, it is evident that 10,351.82 acres granted in fee simple to the Seminole Nation by the Treaty of March 21, 1866, because of an erroneous survey, were excluded from the Seminole domain and included in the Pottawatomie Reservation, and were thereafter erroneously patented to Pottawatomie Indians and white settlers; that after a knowledge of the facts the United States, the guardian of petitioner, took no action to place the Seminole Nation in possession of its lands.

We submit that under these circumstances the lower court should have applied the rule laid down by this Court in *United States* v. *Creek Nation*, 295 U. S. 103, and should have awarded the Seminole Nation just compensation for its lands thus taken.

For the reasons above set forth, we respectfully request that the Court grant a writ of certiorari to the petitioner in this case.

Respectfully submitted,

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(8120)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 830.

THE SEMINOLE NATION, *Petitioner*,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

BRIEF OF PETITIONER.

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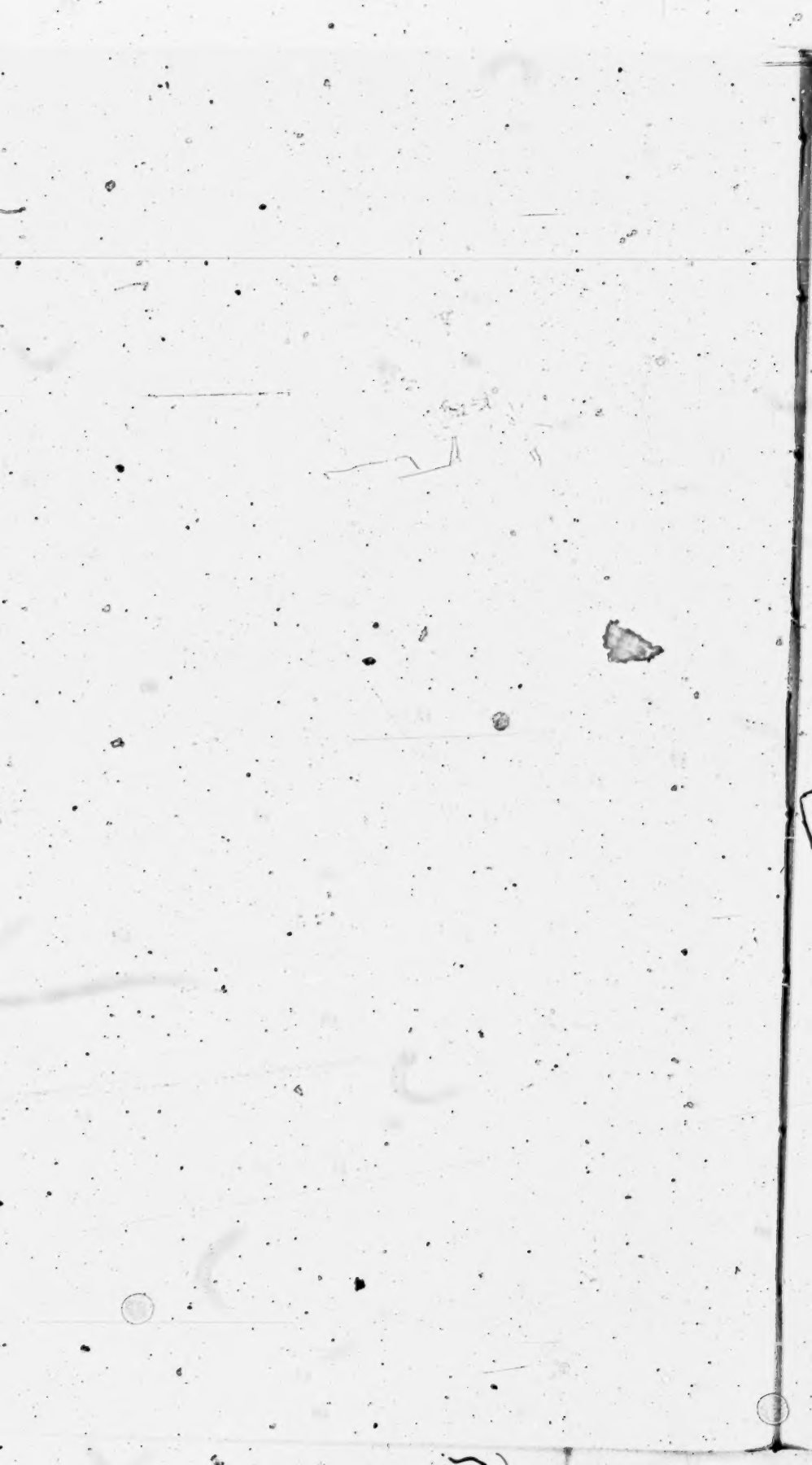

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THE SEMINOLE NATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the Court of Claims.

BRIEF OF PETITIONER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Seminole Nation of Indians, the petitioner herein, respectfully presents the following data for the consideration of the Court upon the review of this case:

Opinion Below.

The opinion of the Court of Claims is not yet reported (R. 6-9).

Jurisdiction.

The judgment of the Court of Claims was entered on May 5, 1941 (R. 9). Motion for a new trial was overruled on October 6, 1941 (R. 10). The petition for a writ of certiorari was filed December 31, 1941, and was granted, February 16, 1942 (R. 36). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 299, 43 Stat. 936, 939 (Section 288 of the Judicial Code as amended, 28 U. S. C. A. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statutes Involved.

The special jurisdictional act, approved May 20, 1924, c. 162, 43 Stat. 133, provides in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."
>
> * * * * * * * * *
>
> "Sec. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation * * *"

The Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provides in part as follows:

> "The Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all *sums* expended gratuitously by the United States for the benefit of said tribe or band; * * *"

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides in part as follows:

> "That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Act * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original jurisdictional Acts, as amended * * *."

The Act of May 22, 1939, c. 140, 53 Stat. 752, provides as follows:

> "In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect as if the cause had been brought here by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.
>
> "The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.
>
> "In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of

substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

Questions Presented.

The questions presented are as follows:

1. Whether the Seminole Nation is entitled to recover just compensation for 10,351.82 acres of its lands, held by it in fee simple, which were inadvertently excluded from its domain by an erroneous survey made by an officer of the United States and subsequently patented by the administrative officers of respondent to white settlers and other Indians—which patents were confirmed by the failure of the United States to cancel them after a full knowledge of said errors.

In other words, whether the rule established in *United States* v. *Creek Nation*, 295 U. S. 103, is applicable to this case.

2. Whether fee simple title to the 200,000 acres of land, described in the Treaty of March 21, 1866, passed by grant *in praesenti* to the Seminoles, by the terms of said Treaty of March 21, 1866, 14 Stat. 755.

3. Whether an erroneous survey would divest the Seminole Nation of title to its lands granted in fee simple by said Treaty of March 21, 1866.

4. Whether the Court of Claims is required to make findings of fact on pertinent and material issues of fact.

(a) Whether in the findings of the lower court the recital of an allegation in the pleadings on a material issue of fact complies with the requirement that the lower court make findings of fact.

(b) Whether the statement in the Court of Claims Findings of Fact that "It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54

acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others," is or can be considered as a proper finding of fact on the material issues of (1) the amount of the acreage erroneously excluded by the survey; (2) how the plaintiff became dispossessed; (3) the manner in which plaintiff's lands were taken; (4) by whom plaintiff's lands were taken; (5) the date of the taking; and (6) by what method plaintiff's lands were granted to others.

5. Whether an item of a purported gratuity offset, which the Court of Claims has allowed the United States in one case, can later be used another time and in a subsequent case to defeat the claim of petitioner in the subsequent case. In other words, is the United States entitled to have more than one allowance for the same item of gratuity offset?

6. Whether the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, which authorizes the Court of Claims to consider and offset "*sums* expended gratuitously by the United States for the *benefit*" of an Indian tribe, permits the court to use lands rather than "*sums*" as a gratuity offset.

Statement of the Case.

The material facts of this case are set forth as follows: By the terms of the Treaty of March 21, 1866, 14 Stat. 755, the United States granted to the Seminole Nation a national domain of 200,000 acres of land. Art. III of said Treaty provides in part as follows:

> "The United States having obtained by grant of the Creek Nation the westerly half of their lands, *hereby grant to the Seminole Nation* the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to-wit: Beginning on the Canadian River where the line dividing the Creek lands

according to the terms of their sale to the United States by their treaty of February 6, 1866 (June 14, 1866), following said line due north to where said line crosses the north fork of the Canadian River; thence up said north fork of the Canadian River a distance sufficient to make two hundred thousand acres by running due south to the Canadian River; thence down said Canadian River to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of One Hundred Thousand ($100,000) Dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written." (Italics ours.)

The Creek "dividing line" under the Creek Treaty of June 14, 1866, 14 Stat. 785, was established by Frederick W. Bardwell in 1871, and was approved by the Secretary of the Interior on February 5, 1872. This Bardwell line became the east boundary of the new Seminole National domain granted to the Seminole Nation by the United States under said Seminole Treaty of March 21, 1866, and constituted the base from which the true west line of the Seminole 200,000 acre treaty tract was to have been established (R. 7).

By Treaty of February 27, 1867, 15 Stat. 531, between the Pottawatomie Indians and the United States, said Pottawatomies were authorized to select a suitable location for the exclusive use and occupancy of said tribe in Indian Territory, said location to be made "without interfering with the locations made for other Indians."[1] Accordingly

[1] In its Finding 4 the lower court stated that the Pottawatomies were "granted" lands immediately west of the Seminole Domain. Let us point out to the Court that no "grant" was made to the Pottawatomie tribe. The Pottawatomie Treaty of February 27, 1867, 15 Stat. 531 (Art. I) contains no such grant, but merely authorizes the Pottawatomie Indians to locate in Indian Territory, and

"To select, if possible, a suitable location for their people without interfering with the locations made for other Indians."

said Pottawatomie Indians selected lands immediately west of and adjoining said Seminole National Domain.

In 1871, and within two months after the survey and running of the Creek "dividing line" by Frederick W. Bardwell, the respondent employed one Nathaniel Robbins to run the western boundary line of this 200,000 acre tract which the respondent had granted to the Seminole Nation under the said Treaty of March 21, 1866, 14 Stat. 755. This survey was completed in 1871 and was approved by the Secretary of the Interior on February 5, 1872. According to *Robbins' calculations* the number of acres included between the Canadian River on the south, the north fork of the Canadian River on the north, the Bardwell line on the east and the Robbins line on the west, was 200,000.03 (R. 7).

As it later developed, said Robbins survey and his calculations based thereon, were grossly in error (R. 12-14), and the said 200,000-acre tract contained 189,648.18 acres only (R. 16), and as a result of said errors 10,351.82 acres of the Seminole National domain, granted to the Seminole Nation by said treaty of March 21, 1866, were erroneously and inadvertently included in the Pottawatomie reservation, located immediately west of said Seminole domain.

By an agreement ratified in the act of March 3, 1891, c. 543, 26 Stat. 989, 1016, 1017, 1026, the Pottawatomies ceded to the United States the tract assigned to them under their treaty of February 27, 1867. In the agreement the United States stipulated that all allotments in severalty made or to be made to Pottawatomie Indians from lands within the cession, shall be completed and confirmed; and that it would

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In the letter of Acting Commissioner of Indian Affairs to the Secretary of the Interior dated May 17, 1887 (Sen. Ex. Doc. No. 64, 51st Cong., 2nd Sess., p. 3) it is stated:

> "March 16, 1872, the Secretary of the Interior decided that the land selected by the Pottawatomies under the treaty of 1867 could not be conveyed by Patent to the Nation, for the reason that as all the members of the tribe had become citizens the nation had become extinct."

make other allotments in severalty to the Pottawatomie Indians out of the lands within their cession; and the ratifying act required that these allotments be made and that the remaining lands be opened to settlement as public lands and sold to settlers at a stated price per acre, which was to be turned into the treasury as public money.

In carrying that act into effect the Indian and land bureaus of the United States erroneously treated the strip of unceded Seminole lands as a part of the Pottawatomie cession, and accordingly allotted and patented said 10,351.82 acres of Seminole lands to Pottawatomie Indians, by way of fulfilling the Government's obligation to them; sold and patented other of said Seminole lands to white settlers; and turned the purchase price received from such sales into the United States Treasury as public money. Thereafter said Seminole lands have been held by the grantees adversely to the petitioner (R. 7, 16).

In 1881 the Seminole Nation acquired a tract of 175,000 acres of land east of and contiguous to the 200,000 acre treaty tract. The history of the acquisition of said 175,000 acre tract is hereinafter set forth. This tract, together with the 200,000 acres acquired by said Treaty of March 21, 1866, should have constituted a domain of 375,000 acres.

In 1897 and 1898 the combined Seminole domain was sectionalized by the United States Geological Survey and it then, for the first time, became apparent that the combined areas of the Seminole tracts were deficient to the extent of some 9,135.57 acres. On January 17, 1900, the Principal Chief of the Seminole Nation wrote to the Commissioner of Indian Affairs as follows (R. 19):

> "By an error made by the United States Surveyors in establishing the boundary of said tracts, there was, as a matter of fact, set apart to the Seminole Nation only 365,864.43 acres, leaving a deficit of 9,135.57 acres."

In said letter the Principal Chief also requested the Respondent to correct the error and give the Seminole Nation the lands to which it was entitled (R. 19).

On February 5, 1900, the Commissioner of Indian Affairs, in his communication to the Secretary of the Interior, reviewed the history of this matter and stated in part as follows (R. 20):

> "The recent surveys in the Indian Territory made by the Geological Survey show that the total area included in the Seminole Nation is 365,864.43 acres, as stated by Governor Brown."

The errors of Robbins in surveying and establishing the west boundary of the Seminole 200,000 acre tract was further recognized by the officials of the respondent. On October 16, 1900, Acting Secretary F. L. Campbell wrote to the Commission to the Five Civilized Tribes, and after reviewing the facts, stated in part as follows (R. 22):

> "'• • • but said surveys appear to indicate several hundred acres in excess of 175,000 acres, which shows that if error existed in the total area its cause will be found in the 'crooked west boundary' of the 200,000 acres west of the 'dividing line' or in the incorrect location of the 'dividing line' itself • • •."

Although as early as 1900 the respondent had knowledge or ample means of knowledge of these errors made by its administrative officers,[2] yet respondent took no steps to correct them and by its inaction it confirmed said erroneous disposals and patents, as of the date of their issuance. Therefore, we submit that the petitioner is now entitled to just compensation for the taking of said lands.

In the lower court the respondent, defendant below, took issue with us on the facts, contending that the area of the Seminole tracts was computed from an erroneous location of the Creek "dividing", or Bardwell line, and relied upon the Bardwell field note record, and certain distances set forth therein.

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[2] In 1900 the United States had before it all the records of these old surveys that were before the General Land Office when it prepared the memorandum May 21, 1930 (R. 35-36), and in 1900 the United States could have directed the field examination such as was made by the General Land Office in 1941 (R. 10-17).

The petitioner, plaintiff below, relied upon the location of the Bardwell line as identified, relocated on the ground and reestablished by H. C. F. Hackbusch, a surveyor of the General Land Office, in 1888 (R. 15). This position was sustained by the lower court in *Creek Nation* v. *United States*, 93 C. Cls. 561, in which the same question was before the court.

Let us digress for a moment and explain to the Court that before this case was originally filed attorneys for petitioner, plaintiff below, having been informed that the old surveys of the Seminole lands were in error, requested the General Land Office to review these surveys and determine which one of them was in error. As all of these old survey records were a part of the Interior Department files we believed that a determination of the matter by the Government's own engineers could be relied upon by both parties.

A memorandum dated May 21, 1930, was prepared by the General Land Office, from the field note records of these old surveys, and the conclusions are set forth therein as follows (R. 35-36):

"Memorandum dated May 21, 1930.

Seminole Tracts:

For the purpose of computing the area subdivided by the Geological Survey of the lands in the two portions constituting the Seminole Lands, the terminal corner of the Creek Dividing Line on the south or right bank of the North Fork of the Canadian River was used as a point of control, from which the Bardwell line as retraced by Hackbusch in 1888 was laid down to the north or left bank of the Canadian River. This covers a distance of 34 miles 37.70 chs., and from this division line as thus defined, it is found that west thereof, there were actually included in the 200,000-acre tract 188,449.46 a. or a deficiency of 11,550.54 a. East of said line there were actually included in the 175,000-acre tract 177,397.71 a., or an excess of 2,397.71 a., leaving a net deficiency in the two tracts of 9,152.83 a."

Accordingly the original petition was based upon the figures and conclusions set forth in this memorandum of the General Land Office.

As the case progressed a question was raised as to the official status of the memorandum, and the conclusions set forth therein were questioned, even though it was reviewed and its conclusions were confirmed by letter of the Acting Assistant Commissioner of the General Land Office to the Commissioner of Indian Affairs, dated January 12, 1931 (R. 26-35), and the Interior Department suggested that the "doubts can be cleared only by a thorough field examination" (R. 29).

Consequently, trial of the case was delayed in the lower Court to permit a thorough field examination on the ground, with the end in view of settling all disputes and controversies with respect to the facts. The Department of Justice, with the consent of petitioner's counsel, requested the General Land Office to make a field examination of the true location of the Creek "dividing" line, as established by Bardwell in 1871, and the lines of certain later surveys that were related thereto in connection with the controversy involved in this suit (R. 10-11).

This investigation was made under the direction of Mr. Arthur D. Kidder, District Cadastral Engineer of the General Land Office.[3] This investigation confirmed the original memorandum of the General Land Office of May 21, 1930, except that the 1888 Hackbusch retracement, as located on the ground, varied slightly from the field note record on

[3] Mr. Kidder has had some forty years experience in this field of engineering work, and was Commissioner of this Court to settle boundary disputes in *Oklahoma* v. *Texas*, 272 U. S. 21, 273 U. S. 93, and *New Mexico* v. *Colorado*, 267 U. S. 30, 268 U. S. 108. Both parties were indeed fortunate to have had the benefit of the wide experience of Mr. Kidder in straightening out these old surveys of the Seminole lands. Strange to say, however, after the Kidder report was submitted to the General Land Office, although the Government requested this field examination, its counsel refused to file it as evidence in the case, and it became the duty of petitioner to do so.

which the original memorandum was based, and this slight variation had the effect of reducing the deficiency in the area of the Seminole 200,000-acre treaty tract from 11,550.54 acres, as originally claimed, to 10,351.82 acres. Thereafter, petitioner adopted the findings of the field examination and reduced its demand to 10,351.82 acres in the lower court, and has confined its demand to that acreage in this Court.

The report of Mr. Kidder, dated March 8, 1941, shows conclusively that the Robbins survey of the west boundary of the Seminole 200,000 acre treaty tract and his computation of the area were in error. In discussing this survey, Mr. Kidder states (R. 12):

> "It appears very evident, after a thorough field examination, that Robbins began his survey at a point that was not in agreement with the dividing line, and that the area which is actually included within the tract boundaries is much less than 200,000 acres.
>
> "There are several factors that contribute to the discrepancy in area: (1) The beginning point was east of the dividing line; (2) The Robbins meander courses are not correct as to their direction from true north; and (3) the length of the Bardwell east boundary, from north to south, is very much less than the distance that is given in the field notes."

Kidder further states (R. 14):

> "The actual length of the west boundary of the 200,000 acre tract, between the rivers, as taken from the township plats, is 28.86 chains (1905 feet) *greater* than the Robbins field note record distance.
>
> "As a consequence of the above known discrepancies it is impracticable to adjust the Robbins lines to secure a closure for the computation of the enclosed area. The showing is made that the tract contains 200,000 acres, but the calculation cannot be verified. It is necessary to abandon the Robbins record and take the directions and lengths of lines as these are found on the ground;"

The report also sets forth a full account of the survey of the retracement of the Creek "dividing" line, or Bardwell line, made in 1888 by H. C. F. Hackbusch, a surveyor of

the General Land Office, and sets forth the fact that Hackbusch found some of the old corners set by Bardwell on the ground, and ran a line retracing the Bardwell line, through these identified corners (R. 14-16). The area in the Seminole 200,000 acre tract betwen the Bardwell line as retraced by Hackbusch, and the Robbins west line, and the north and south Canadian Rivers, was 189,648.18 acres, or 10,351.82 acres short of the 200,000 acres granted to the Seminoles by the Treaty of March 21, 1866 (R. 16).

Even though the lower court had this evidence before it yet it failed to make a definite finding as to the Seminole acreage erroneously excluded from the Seminole 200,000 acre tract by the Robbins survey, and included in the Pottawatomie Reservation.

In its Finding 4 the lower court said (R. 7):

> "It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54 acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others."

The lower court failed to find as a material fact that there was an actual deficit of 10,351.82 acres in said tract, as shown by the Kidder report. This seemed strange to us in view of the holding of the lower court in *The Creek Nation* v. *United States*, 93 C. Cls. 561 (decided on the same day the case at bar was decided), settling this identical question that the *true Bardwell line location* was that which was reestablished by Hackbusch in 1888, and that the Hackbusch retracement line was the point from which to make the computation of the acreage in that case.

Specification of Errors to be Urged.

The lower court erred:

1. In failing and refusing to allow just compensation to petitioner under the rule established in *United States* v. *Creek Nation*, 295 U. S. 103, for 10,351.82 acres of its lands,

owned by petitioner in fee simple and taken from it by patents inadvertently issued thereon pursuant to the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026, which patents were confirmed by the United States through its failure to place the Seminole Nation in possession of said lands after a full knowledge of the facts.

2. In failing to find and hold that the petitioner was divested of its fee simple title to 10,351.82 acres, which were part of a definitely described 200,000-acre tract, acquired by grant *in praesenti* in the Treaty of March 21, 1866, when patents thereto were issued by respondent pursuant to the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026.

3. In failing to find from the evidence submitted the amount of acreage of petitioner's lands excluded by the erroneous Robbins survey of the west boundary of the Seminole 200,000-acre tract, and thereafter patented to white settlers and individual Pottawatomie Indians.

4. In finding and holding that the 175,000-acre tract purchased by the United States for the Seminoles by Act of August 5, 1882, c. 390, 22 Stat. 257, 265, to correct an error made by the United States in locating said Seminoles on the wrong land, would defeat the claim of the Seminole Nation for just compensation for 10,351.82 acres of Seminole lands granted to the Seminole Nation in fee simple by the Treaty of March 21, 1866, 14 Stat. 755.

5. In finding and holding that said 175,000-acre tract which respondent turned over to the Seminole Nation to protect them in their improvements, constituted an element of gratuity.

6. In failing to find definite values of the respective elements of "gratuity" and "reparation" in connection with the 175,000-acre offset claim of respondent.

7. In holding that under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, it could use land as an offset, rather

than the actual "sums" expended for the land claimed by respondent as an offset.

8. In holding that under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, it had jurisdiction to offset land against land, without first definitely determining the amount due petitioner for its land taken by respondent, or the actual amount of the gratuity element in the land claimed by respondent as an offset.

9. In holding that, after having allowed respondent an offset for the 175,000 acre tract in case No. L-51, *The Seminole Nation* v. *United States*, 93 Ct. Clms. 500, 525, it could again and for a second time allow the respondent another offset, in this case, for the same tract of land.

Summary of Argument.

Our argument on the case in the main may be summarized as follows:

1. That under the rule established in *United States* v. *Creek Nation*, the Seminole Nation is entitled to just compensation for 10,351.82 acres taken by the United States from the Seminole Nation and patented to homesteaders and Pottawatomie Indians, which patents were confirmed by the failure of the United States to cancel them after a knowledge of the facts.

(a) That by Treaty of March 21, 1866, 14 Stat. 755, the Seminole Nation acquired by grant *in praesenti* the fee simple title to a definitely described area of 200,000 acres of lands for its national domain.

(b) That the erroneous survey of the west boundary of the Seminole domain, made by Robbins in 1871, did not divest the Seminole Nation of its title to said 10,351.82 acres thus erroneously excluded from the Seminole domain and included in the Pottawatomie reservation.

(c) That the erroneous and inadvertent issuance of patents to said Seminole lands, confirmed by the United

States through its failure to correct said errors after a knowledge of the facts, created the taking.

(d) That the Seminole Nation is entitled to just compensation for said 10,351.82 acres so taken; *i.e.*, the value of the lands as of the dates of said patents, and in addition thereto interest at 5 per cent per annum on said values to date of judgment.

2. That the lower court failed in its duty to make adequate findings on material issues of fact with respect to the affirmative claim of petitioner in that it failed to find the amount of acreage excluded from the Seminole domain and included in the Pottawatomie reservation by said erroneous Robbins survey.

With respect to the offset phase of this case, our argument may be summarized as follows:

1. That the 175,000-acre tract is an entirely different transaction, depending upon different considerations and circumstances, than the lands forming the subject matter of this suit, and therefore has no place in this or any other suit of the Seminole Nation, and forms no basis of a counter-claim or a gratuity offset against the Seminole Nation.

2. That the lower court erred in using this item to defeat the present claim of petitioner for just compensation for said 10,351.82 acres of Seminole domain, for the reasons that:

(a) This item was not an element of gratuity, but was merely an element of reparation to the Seminole Nation for an error made by the United States.

(b) That the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, permits the court to offset *sums* and not lands in kind, and the lower court has used the item in a manner not authorized, even if this item were properly chargeable to the Seminole Nation.

(c) That the lower court already has used this same item as a gratuity offset in case No. 348 in this court, and its right to do so has been challenged by this peti-

tioner in that case, and clearly the lower court cannot use this item a second time in this case to defeat this claim of the Seminole Nation, after it has once before been used as an offset in another Seminole case.

Argument.

With respect to the affirmative claim of petitioner we contend that the lower court erred in failing to award just compensation to the Seminole Nation for the 10,351.82 acres involved in this suit, under the rule laid down by this Court in *United States* v. *Creek Nation*, 295 U. S. 103.

The rule established in United States v. Creek Nation applies to this case.

The facts in this case are similar in all respects to those in *United States* v. *Creek Nation*, 295 U. S. 103, and we submit that the rule established in that case is equally applicable to the case at bar.

In this connection let us point out to the court the following similarities in these cases:

1. That the Seminole Nation owned its lands in fee simple; and the United States guaranteed them quiet possession of said lands.

2. That an erroneous survey excluding Seminole lands from the Seminole domain and including them in the lands of another tribe would not divest title from the Seminole Nation.

3. That the erroneous patents issued, when confirmed by the United States after a disclosure of the facts, would create a taking as of the dates of the issuance of said patents.

4. That the Seminole Nation is entitled to just compensation for the lands so taken.

The Seminole Nation, like the Creek Nation, had a fee simple title to its lands, not the usual Indian right of oc-

cupancy with the fee in the United States. That title was acquired and held under said Treaty of March 21, 1866, 14 Stat. 755 (quoted *supra* p. 5), and by Article 1 of this treaty it was provided that "the United States guarantee them quiet possession of their country."

The 10,351.82 acres of Seminole lands involved in this suit were a part of the 200,000-acre tract *granted in fee simple* to the Seminole Nation under said Treaty of March 21, 1866. The Seminole title, therefore, was founded upon this treaty. This treaty stated in part that "The United States * * * hereby grant to the Seminole Nation" the lands described therein. The words "hereby grant" denote a *grant in praesenti*. *United States* v. *Brooks*, 10 How. 442; *Leavenworth, etc., Railroad Co.* v. *United States*, 92 U. S. 733, 741; *Wright* v. *Roseberry*, 121 U. S. 488, 496. By virtue of this treaty the title of the Seminole Nation attached to said 10,351.82 acres, and until a cession of said lands by the Seminole Nation, or until there was an appropriation of said lands by the United States, the fee title remained in the Seminole Nation. See *New York Indians* v. *United States*, 170 U. S. 1.

It matters not that the boundaries of said Seminole 200,000-acre tract were surveyed, for the Seminole title did not depend upon the survey, but rested squarely upon the Seminole Treaty of March 21, 1866. As this court in *United States* v. *Carpenter*, 111 U. S. 347, 349, said:

> "It matters not whether the land had been surveyed or not; the treaty was notice that a part of the quarry would be retained by the Government, and that the whole might be for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the land department."

That the erroneous survey of the west boundary of this Seminole treaty tract, whereby said 10,351.82 acres of Seminole lands were excluded from the Seminole domain and included in the Pottawatomie reservation, would not be

an appropriation of these lands is well settled. This point was directly passed upon in *United States* v. *Creek Nation*, 295 U. S. 103, 111, wherein this court said:

> "Plainly the appropriation was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership, nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error."

Therefore, this erroneous Robbins survey of the west line of the Seminole domain, did not amount to an appropriation of these Seminole lands, and it was not intended to do so. It was through inadvertence that this error was made by the officer of respondent, and led to the further errors subsequently committed, which in themselves created the taking of these Seminole lands.

The Subsequent Disposals of Seminole Lands Created the Taking.

Because of the error in the survey of the west line of the 200,000-acre Seminole national domain, 10,351.82 acres thereof were erroneously included within the Pottawatomie tract as officially surveyed and platted, and thereafter were occupied by that tribe. The same is true of the Creek lands in the *Creek* case, in which Creek lands were thrown into the Sac and Fox reservation, and were thereafter occupied by that tribe.

By an agreement ratified in the Act of March 3, 1891 (Sec. 8, c. 543, 26 Stat. 989, 1016), the Pottawatomies ceded to the United States the tract assigned to them under their treaty of February 27, 1867, 15 Stat. 531. In the agreement the United States stipulated that all allotments in severalty made, or to be made, to the Pottawatomie Indians out of lands within their cession, under the Act of February 8, 1887, c. 119, 24 Stat. 388, shall be completed and confirmed; and the ratifying act required that after these allotments

were made the remaining lands were to be opened to settlement as public lands and sold by settlers at a stated price per acre, and the proceeds were to be turned into the treasury as public money.

Section 16 of said Act of March 3, 1891, provided in part as follows:

> "That whenever any of the lands acquired by either of the three foregoing agreements respecting lands in the Indian or Oklahoma Territory shall by operation of law or proclamation of the President of the United States be open to settlement they shall be disposed of to actual settlers only, under the provisions of the homestead and townsite laws * * *."

In 1896 and 1897, when the Seminole lands were sectionalized by the United States Geological Survey, the errors became apparent. In 1900 the Seminoles demanded the lands to which they were entitled (R. 19). However, the erroneous patents already issued were permitted to stand, and further erroneous patents were thereafter issued, and no steps were taken by the United States to correct said errors, or to place the Seminole Nation in possession of its lands.

Nor were any steps taken by respondent under the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, which provided in part as follows:

> "Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the * * * Seminole tribe * * * for * * * recovery of any land claimed by any of said tribes * * *, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits. * * *"

As was said by this court in *United States* v. *Creek Nation*, 295 U. S. 103, 110:

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state

of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly, the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States, in effect, confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.

"We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe."

In adopting the Government's theory that the patents created the taking in the *Creek* case, this Court further stated, *Creek* case, *supra*, p. 111:

"But not so of the disposals under the act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip: but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals. It was through them that the lands were taken; so the compensation should be based on the value at that time * * *."

Therefore, this court has clearly held that the confirmation of the erroneous patents by the United States created the taking, which required the United States to make just compensation to the tribe for the lands so taken as of the dates of the patents.

The court further lays down the rule governing the just compensation to be paid to the tribe. In the *Creek* case, *supra*, pp. 111-112, this court said:

"But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added. The treaty of 1866, the act of 1889 and other statutes show that five per cent per annum is a reasonable rate as between the parties here."

Seminole treaties and statutes dealing with Seminole trust funds show that five per cent per annum was paid by the United States on Seminole moneys held in trust by it (Treaty of March 21, 1866, 14 Stat. 755; Act of March 2, 1889, c. 412, 25 Stat. 980, 1004; Seminole Agreement, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567).

Therefore, we submit that the case at bar is similar to the *Creek* case, and that the lower court should have applied the same principles of law in this *Seminole* case as was applied by this Court in the *Creek* case.

The Lower Court erred in injecting the Seminole 175,000-acre tract in this suit.

The sole reason for the failure of the lower court to apply the rule in the *Creek* case was that in view of the fact that the Seminole Nation had been given *another* tract of 175,000 acres of lands, it was not entitled to just compensation for said 10,351.82 acres as of the dates of the issuance of patents.

The lower court said (R. 8-9):

"Plainly it cannot recover. Although there may have been this deficit, more or less, in the 200,000 acre tract the defendant was obligated to set apart for plaintiff, the plaintiff was compensated therefor fifteenfold by the addition to the reservation of 175,000 or more additional acres immediately to the east. The plaintiff was entitled to receive from the defendant only 200,000 acres, but it has in fact received at least

360,000 acres and, therefore, cannot complain that there was a small deficit in the original 200,000 acre tract agreed to be set apart to it."

In this holding the lower court erred in three respects:

1. The acquisition of the 175,000 acre tract by the Seminole Nation did not involve an element of gratuity, but constituted an element of reparation for the Government's own error.

2. That the 175,000 acres cannot be offset as land under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, which permits *sums* only to be offset against an Indian tribe.

3. That the lower court has already offset the amount paid by the United States for this tract in *The Seminole Nation* v. *United States*, 93 Ct. Cls. 500, and it cannot properly use the same item again to defeat the present claim of petitioner.

Petitioner's claim, as heretofore set forth, was clear, definite and certain; but the lower court instead of determining the question of respondent's liability on petitioner's claim and then offsetting any "sums" which the respondent may have had, mixed up petitioner's claim with an alleged claim of respondent for a purported gratuity offset on another and distinct tract of land of 175,000 acres. The acquisition by the Seminole Nation of said 175,000 acre tract depended upon an entirely different consideration, and had a separate and distinct history.

In order that the court may see how petitioner's claim was confused with this transaction, the history of said 175,000 acre tract is set forth as follows:

By treaty of June 14, 1866, 14 Stat. 785, the Creek Nation ceded to the United States the west half of its entire domain, and retained the east half as its permanent national domain. Said lands were "to be divided by a line running north and south" (Article 3). By Treaty of March 21, 1866, 14 Stat. 755, the Seminole Nation purchased as its national domain

200,000 acres of the lands to be ceded by the Creeks, immediately west of the adjoining said Creek "dividing line."

In the fall of 1866—before the Creek "dividing line" was surveyed—the Seminoles were removed by the United States to what was believed to be their new 200,000-acre national domain granted to them in said Treaty of March 21, 1866, and respondent's officers encouraged them to settle down and make permanent improvements thereon as rapidly as possible. The officers of the Government assured them that they would be protected in their improvements (Finding 3, R. 7; Sen. Ex. Doc. No. 75, 47th Cong., 1 Sess., pp. 5, 7; Sen. Ex. Doc. No. 126, 51 Cong., 1 Sess., pp. 2, 3, 6, 9; R. 17-19).

When this treaty was executed the Seminoles were promised that their new domain would be surveyed in the fall of 1866, but this was not done (R. 17).

In 1868 the first attempt was made by the United States to survey the Creek "dividing line" which was also to be the eastern boundary of the Seminole 200,000-acre tract. Under direction of the Commissioner of Indian Affairs, one Rankin, in 1868, surveyed this line. The Seminoles were shown the Rankin line by defendant's officers, and were told that this was their eastern boundary, and those who were located east thereof were moved west of this line (R. 17).

However, the Creeks objected to this survey, claiming that said line had been run too far east. The Seminoles became alarmed at the prospect of being forced to move again, but were assured by respondent's officers that they would not be disturbed even if the Rankin survey were found to be erroneous, and that they would be protected in their improvements (R. 17-18; Sen. Ex. Doc. No. 126, 51st Cong., 1st Sess., p. 2).

The Rankin survey was found to be erroneous and was not approved, but no immediate steps were taken by respondent to correct this error or to establish the correct Creek "dividing line" (Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 5; R. 18).

Finally, in 1871, the Creek "dividing line" was resurveyed and established by Frederic W. Bardwell, and this survey was approved on February 5, 1872. This Bardwell line was placed 7 miles west of the Rankin line, and the large area between the two lines, then estimated at 175,000 acres, and occupied by the Seminoles, was thrown within the boundaries of the Creek Nation. Thus it was discovered that the Seminoles had, by error, been settled *in part* on lands of the Creek Nation. During the four-years interval between the Rankin and Bardwell surveys the Seminoles had occupied this area believing, and being assured by respondent's officers, that this was a part of their new national domain, and had built homes and made other extensive and valuable improvements on these lands (Sen. Ex. Doc. 126, 51st Cong., 1 Sess., p. 9), which at that time were more valuable than the lands on which they were located.

Disputes between the Creek and Seminole Nations soon arose over the jurisdiction of this area, and the Seminoles were much discouraged over the prospect of having to move again and reestablish their homes. As the United States Agent for the Seminoles stated in his report to the Commissioner of Indian Affairs, dated September 25, 1872 (1872 Rept. Comr. Ind. Off., p. 241):

> "It is to be hoped that the Seminoles will be protected in their just title to their present homes, and that the Government will urge upon the Creek authorities a speedy settlement of the disputed title of the Seminoles to the lands upon which the Government placed them, and which they have improved with more assiduity and care than their neighbors. Many of them are still in doubt whether their lands and improvements will be secured to them, and this uncertainty in this class of Indians is exceedingly discouraging and rests like an incubus upon their energies and labors.
>
> "The Seminoles do not feel, and, I think, very justly, that they are a party in the settlement of this matter, excepting as a protesting party against their removal from this to a new country. They say that they pur-

chased of the United States Government a certain amount of land, adjoining the Creek country on the west; that the Government showed them their boundaries, and located them, and told them this was to be their future home, and for them to go to work and improve it, and they have done so in good faith, and they are now happy and contented. And if their improvements have been made upon Creek soil, which is evidently the fact, the Government, and not they, is responsible, and they look to the Government to secure them in their rights and protect them in their present homes."

And as the Commissioner commented to the Secretary of the Interior in this same report, pp. 36-37, as follows:

"* * * A cause of discontent and just complaint on the part of this people is found in the fact that the Government, in providing them a new home, after the cession of their reservation under the treaty of 1866, misled them as to their boundary-line, so that many have settled beyond the line, upon territory still belonging to the Creeks, and have there established themselves in comfortable homes and upon lands which they have very much improved. The Seminoles so situated are troubled and discouraged, having no security as to their possession of the lands and improvements thereon, so occupied. As the mistake was not theirs, they look to the Government to adjust the matter with the Creeks, and to secure them in their rights and in the possession of their present homes. The Department has the matter under careful advisement, and will earnestly seek to avoid any unfortunate issue of the complication. So soon as the best method of saving at once the rights of the Creeks and the equities of the Seminoles shall be determined, Congress will be asked to provide the requisite authority for the adjustment of the question."

Accordingly Congress, by Act of March 3, 1873, c. 322, 17 Stat. 626, authorized negotiations with the Creek Nation for the cession of 175,000 acres of its domain, the respondent believing that such a purchase would cover all of the

Creek lands then occupied and improved by the Seminoles.

Further to remedy the situation, and to fulfill its promises to the Seminoles—to protect them in their improvements—the respondent, on February 14, 1881, purchased from the Creek Nation 175,000 acres of land immediately east of the Creek "dividing line", as run by Bardwell, and added same to the original Seminole 200,000-acre tract without cost to the Seminole Nation. By Act of August 5, 1882, c. 390, 22 Stat. 257, 265, the amount of $175,000 was duly paid the Creek Nation for these lands. (*Creek Nation v. United States*, 93 C. Cls. 561, 562-563; Senate Ex. Doc. No. 126, 51st Cong., pp. 2, 3, 6, 9; Sen. Ex. Doc. No. 75, 47th Congress, 1st Sess., p. 6; Finding 5, R. 7-8; Rept. Comr. Ind. Aff., 1872, pp. 36-37, 241; R. 17-19).

When the Act of August 5, 1882 was before Congress, and this Seminole matter was under consideration, Congress had before it two views concerning the liability of the Seminoles for the 175,000 acres purchased from the Creeks. Commissioner of Indian Affairs, H. Price, in his letter to the Secretary of the Interior, dated January 9, 1882, expressed the view that the Seminoles should pay for the Creek lands upon which they had been erroneously located, and in his draft of the proposed legislation to settle the matter, he included a provision that the Seminoles relinquish to the United States 175,000 acres on the west side of their 200,000-acre treaty tract in lieu of the 175,000 acres to be added to their domain (Sen. Ex. Doc. No. 75, 47 Cong., 1 Sess., pp. 2-3). The other view of the matter was advanced by Acting Commissioner of Indian Affairs, Thomas M. Nichol, in his letter to the Secretary of the Interior, dated February 18, 1881, submitting a draft of the proposed legislation to rectify the matter. Acting Commissioner Nichol viewed the matter as follows (Sen. Ex. Doc. No. 75, 47 Cong., 1 Sess., p. 7, Cong. Ser. 1989):

> "As shown in the foregoing, the homeless condition of the Seminoles, and their unwelcome occupation of lands belonging to another tribe, as well as the neces-

sity of settling them somewhere as soon as possible, in order to enable them to commence to support their families, led the Government to locate them on what, at the time, was supposed to be the land that would enure to them, when the 'dividing line' should be surveyed, but which, upon the correct survey of the line, was found to be included in the Creek reserve. That they were thus erroneously located, is under the circumstances, not to be wondered at, but certainly it was through no fault of the Seminoles, and the Government should therefore pay the Creeks for the lands sought to be purchased, and should also meet the expense of the survey thereof. The Seminoles certainly should not be required to do this, especially when it is considered that they received only fifteen cents an acre for the country relinquished by them in the treaty of 1866, while the United States paid the Creeks thirty cents per acre for the half of their domain ceded to the United States, and then charged the Seminoles fifty cents an acre for the part of the same land sold to them, and only after the lapse of nine years made up to them the difference in price."

Both views were before Congress at the time, and Congress rejected the view that the Seminoles be required to pay for this land, and adopted the view expressed by Acting Commissioner Nichol, for the Act of August 5, 1882 provides as follows:

"To pay the Creek Nation of Indians for one hundred and seventy-five thousand acres of land now occupied by Seminole Nation, the sum of one hundred and seventy-five thousand dollars, as per agreement, made in pursuance of the Act of March third, eighteen hundred and seventy-three, which agreement bears date February fourteenth, eighteen hundred and eighty-one, and is now on file in the Department of the Interior; said sum to be immediately available."

Thus no provision was made requiring the Seminole Nation to pay for this land, and it is clearly evident that Congress intended the above payment as reparation to the

Seminoles for the error made by the United States in locating them on the wrong land.

The eastern boundary of the 175,000-acre tract was surveyed in 1888 by respondent's officer, H. C. F. Hackbusch. Concerning said east boundary, said Hackbusch reported as follows (*Creek Nation* v. *United States*, 93 Ct. Cls. 561, 570-571):

> "This line (the east boundary of the Seminole), in accordance with special instructions, was run so far east of the Creek Dividing Line as to include an area of 175,000 acres. But the one hundred seventy-five thousand acres do not embrace all the lands now occupied by the Seminoles. Some valuable property remains east of the east boundary, such as the store and post office at We-wo-ka; the We-wo-ka mission; the store and post office at Arleka and several homesteads of the Indians. As near as I can estimate, not having a positive knowledge, it will take about twenty-five thousand acres more or less to include all the property of the Seminole Indians, which now remains east of the east boundary, as surveyed by me, under my contract of June 26, 1888."

Thus the respondent just partially corrected said errors. We have seen that the United States removed the Seminoles to what was believed to be their new national domain before the Creek "dividing line" was surveyed, and encouraged them to make improvements as rapidly as possible; then led them to believe that the Rankin line was the correct dividing line, and promised them that if it were not correct, the United States would protect them in their improvements; and that in reliance upon these promises the Seminoles in good faith continued to make improvements on these lands. When the correct "dividing line" was established, and it was determined that the United States had erroneously located the Seminoles on Creek lands, the Government made good its promise to the Seminoles in part only. We submit that under these circum-

stances said $175,000 was disbursed by respondent to correct its own errors, and to carry out its promises to the Seminoles, and therefore this item would not constitute an element of gratuity.

Furthermore, we believe that rather than being an element of gratuity this item is merely an element of reparation. The improvements which the Seminoles had made upon these lands were very valuable. In Sen. Ex. Doc. No. 126, 51st Cong., 1st Sess., p. 2, the Secretary of the Interior stated that the Seminoles had valuable improvements on this Creek land. On page 3 thereof the Commissioner of Indian Affairs stated that the Seminoles had "made for themselves homes and valuable improvements" on this land. On page 6 thereof the Seminole delegates state "The homes and improvements of the Seminoles are worth vastly more than the lands upon which they are situated will cost." On page 9 thereof Assistant Attorney General, Geo. H. Shields, stated that "nearly all of the extensive improvements made by the Seminoles since their settlement on the land, * * * and also the agency buildings," were on this Creek land. In Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 6, Acting Commissioner of Indian Affairs, Thos. M. Nichol, stated that since the fall of 1866 the Seminoles had "made for themselves homes and very valuable improvements" on these lands.

We submit that in the absence of proof to the contrary —and the respondent has the burden to prove affirmatively its offset claim—the record outlined above clearly shows that the improvements made by the Seminoles from the time of their location on these Creek lands (1866) to 1871, would far exceed the $1.00 per acre paid by the United States for these Creek lands.

Thus, in refusing recovery in this case the lower court mixes up lands of the two entirely separate and distinct Seminole tracts, and disregards the fact that the 175,000 acre tract was given to the Seminoles to make good the error of the United States in settling them on the wrong

land, and to make good its promise to protect the Seminoles in their improvements. Thus this transaction involved no element of gratuity but constituted an element of reparation in that had the Government moved the Seminoles off the Creek lands and paid them for their improvements, it would have cost the Government more to rectify its error than to buy the land and give it to the Seminoles.

The Lower Court Has No Jurisdiction to Offset Lands Against Lands.

The lower court has no jurisdiction to offset lands against lands, as it did in this case. The Act of August 12, 1935, c. 508, 49 Stat. 571, 596, permits "sums" only to be offset as gratuities. While the lower court's decision recognized this fact, yet it goes on to state as follows (R. 9):

> "* * * Therefore, if the plaintiff be entitled to recover for any deficit in the 200,000 acre tract, the defendant would be entitled to an offset of the value of the acreage given them gratuitously. This value is far in excess of the value of whatever deficit there may have been."

Here again the lower court refuses to recognize the fact that the 175,000 acre tract was an element of reparation, and that it was not an element of gratuity. Furthermore, it states that the value of the 175,000 acre tract "is far in excess of the value of whatever deficit there may have been." This conclusion is not supported by any finding of the value of the 10,351.82 acre deficit, as of the dates of the patents issued—the date of the taking by the United States.

Thus, without endeavoring to establish and find the values of the acreage involved in this suit as of the date of taking, the lower court summarily jumps to the conclusion that the 175,000 acre tract was of more value than the smaller acreage claimed, and without considering that the lands involved in the claim were not a part of said

175,000 acre tract, or that the date of taking was at a later date than the transaction with respect to the 175,000 acre tract.[4]

The United States Is Entitled to Credit Just Once for an Item of Offset. . .

By the use of this 175,000 acre tract as a gratuity offset against petitioner, the lower court has used this same item of offset twice: in this case, and in *Seminole Nation* v. *United States*, 93 C. Cls. 500. In said *Seminole* case the lower court allowed the United States a gratuity offset in the amount of $165,847.17 for said 175,000 acre tract. The right of the defendant to such an offset in that case is challenged by the petitioner in case No. 348 now pending before this Court. Notwithstanding this allowance, the lower court again uses the same item of offset in the case at bar, to defeat the claim of the petitioner for just compensation for the value of the 10,351.82 acres involved in this case. Thus we have an anomalous situation of the lower court's allowing the same item of offset twice, and in two different amounts and in two different ways. Clearly the lower court erred in again using this item as an offset in the case at bar.

The Lower Court Failed to Find the Material Facts.

Let us point out to the Court that the lower court failed to find the facts material to the issues involved in this case. For example, in Finding 4 the lower court stated (R. 7):

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[4] In his concurring opinion (R. 9) Judge Madden pointed out that "when the defendant settled the Seminoles on the wrong land, and they made their improvements there, there was an obligation on the defendant to repair its mistake." He thus recognized the fact that an element of reparation was present. However, without a finding by the lower court of the value of the element of reparation and the value of the element of gratuity involved in this 175,000-acre Seminole tract, the conclusion of the concurring opinion—that the element of gratuity more than offset the element of reparation—clearly would not be justified.

> "It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54 acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others."

We submit that this statement is not a proper finding as to whether or not the said 10,351.82 acres of Seminole land were excluded from the Seminole domain and included within the Pottawatomie Reservation. This is merely a statement of the pleading and clearly is not a proper finding of fact. In *United States* v. *Henry*, 17 Wall. 405, 408, this Court held that a statement of the Court of Claims that the mustering officer "alleged" that a company was below the minimum strength was not a proper finding of fact.

The Court of Claims was empowered to promulgate rules for its government and for the regulation of practice therein (U. S. Code, Title 28, Sec. 263).

Rule 75 of that court provided in part as follows:

> "(a) In any case where both parties request in writing at the time the case is submitted to the Court that the facts be specially found, the court will make and enter special findings of fact as part of its judgment.
>
> * * * * * * * * *
>
> "(c) The special findings required by the two preceding paragraphs shall be in the nature of a special verdict, and shall set forth the ultimate facts found from the evidence, but not the evidence from which they are found. (See act of February 13, 1925, 43 Stat. 936, 939; U. S. Code, Title 28, sec. 288.)"

Whether the Robbins survey was erroneous and, if so, how many acres of Seminole lands were included in the Pottawatomie reservation, were essential questions of fact in the case, and clearly the lower court failed to comply with its rule in neglecting definitely to determine these material facts.

The Act of May 22, 1939, c. 140, 53 Stat. 752, permits this Court to review the facts wherein "there is a failure to make any finding of fact on a material issue."

With the essential parts of the Kidder report before it we submit that this Court would be justified in making the following findings on the above material issues of fact:

1. That Nathaniel Robbins, under direction of the Commissioner of Indian Affairs, surveyed the north and west boundaries of the Seminole domain granted to the Seminole Nation by said Treaty of March 21, 1866, and his survey was approved by the Secretary of the Interior on February 5, 1872. This survey was grossly in error in that Robbins failed to begin his survey of the north boundary at the Creek "dividing line" established by Bardwell in 1871, but began at a point 1406 feet east of that line; that the Robbins meander courses of the North Canadian River, which forms the north boundary of the Seminole domain, are not correct as to their direction from true north; the Bardwell measurement of the length of the Creek "dividing line," which formed the east boundary of the Seminole 200,000-acre tract, is very much less than the distance given in the Bardwell field notes; and the actual length of the west boundary of said 200,000-acre tract, between the north and south Canadian Rivers, is 1905 feet *greater* than the Robbins field note record distance (R. 11-14). The result of these known discrepancies was to indicate a greater calculated area for the 200,000-acre tract than was actually included by Robbins within the boundaries of this tract (R. 11-14).

2. That the east, north and south boundaries (the North and South Canadian Rivers, and there being no appreciable change in the banks since 1895, or since 1871, R. 12-13)—all being fixed boundaries—the west line as surveyed by Robbins was established too far east, and a strip of 10,351.82 acres of the Seminole National domain was included in the Pottawatomie Reservation located immediately west

of the Seminole domain, and the 200,000-acre tract included but 189,648.18 acres (R. 16).

We submit that the lower court should have found the facts with respect to the following material issues of fact:

1. Whether petitioner received fee simple title, *in praesenti*, to the 200,000 acres described in the Treaty of March 21, 1866, 14 Stat. 755.

2. That the Robbins survey of the west boundary of the Seminole national domain was grossly in error.

3. The amount of acreage actually excluded from petitioner's 200,000 acre tract by the erroneous Robbins survey of the west boundary line in 1871.

4. The time when the errors of the Robbins survey of the 200,000 acre tract first became apparent to the officials of the respondent.

5. The time when the Seminole Nation first demanded the lands to which they were entitled, and requested respondent to correct the error.

6. The amount of acreage taken from petitioner and patented to white settlers and individual Pottawatomie Indians.

7. The amount, if any, of the element of gratuity present in the 175,000 acre tract claimed by the respondent as an offset.

8. The amount of the element of reparation present in the 175,000 acre tract.

9. The value of petitioner's 10,351.82 acres at the time of the taking.

From a study of the case of *United States* v. *Creek Nation*, 295 U. S. 103, it will readily be seen that this Court considered these facts material to the proper determination of that case. A mere glance at the lower court's Findings in this case (R. 6-8) shows the complete absence of the finding of these necessary facts.

Conclusion.

From the facts herein set forth, which are supported by the record before this Court, it is evident that 10,351.82 acres granted in fee simple to the Seminole Nation by the Treaty of March 21, 1866, because of an erroneous survey, were excluded from the Seminole domain and included in the Pottawatomie Reservation, and were thereafter erroneously patented to Pottawatomie Indians and white settlers; that after a knowledge of the facts the United States, the guardian of petitioner, took no action to place the Seminole Nation in possession of its lands.

We submit that under these circumstances the lower court should have applied the rule laid down by this Court in *United States* v. *Creek Nation*, 295 U. S. 103, and should have awarded the Seminole Nation just compensation for its lands thus taken.

Furthermore, we submit that the lower court improperly injected into this suit the issue with respect to the $175,000-acre Seminole tract, and that in any event this item is not a proper offset against the Seminole Nation.

For the reasons above set forth, we respectfully request that this Court reverse the decision of the lower court and direct it to proceed further in such manner as this Court decides will be just and proper with respect to the rights of petitioner in this case.

Respectfully submitted,

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Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 830.

THE SEMINOLE NATION, *Petitioner*,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF PETITIONER.

PAUL M. NIEBELL,
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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent concedes (Res. Supple. Memo. p. 21), that the judgment of the Court of Claims "cannot be supported on either of the grounds stated in the opinion of the Court of Claims," and suggests that the judgment be reversed, and the cause remanded to the Court of Claims for a determination of several of the issues of law and fact.

The respondent also concedes that the lands of petitioner were erroneously excluded from the domain granted to them

by treaty of March 21, 1866, by an erroneous survey of the west line of this domain made by Nathaniel Robbins in 1871; and that the strip of lands west of the Robbins line herein involved were patented to Pottawatomie Indians and homesteaders (Supple. Memo. pp. 6, 17). With this concession of the facts the basic questions of law in the case may be raised, and we suggest to the Court that while the case is before it, time and expense would be saved were the Court to determine finally these basic questions of law, and then remand the case to the lower court for such further proceedings as it might require.

The respondent agrees with us that there are several basic questions in the case, and discusses them (Res. Supple. Memo., pp. 17-19). These questions are set forth as follows:

1. Whether the Seminole Nation acquired fee simple title to the 200,000 acres of lands granted to it by the treaty of March 21, 1866.

2. Did Robbins, in running the west boundary, exclude part of the Seminole lands from their treaty domain?

3. Whether the Seminole Nation acquiesced in the erroneous Robbins line.

4. When did the Respondent take the Seminole lands excluded by the erroneous Robbins survey?

We discuss these questions briefly below.

The Seminole Nation Acquired Fee Simple Title to the 200,000 Acres of Lands Granted to it by Treaty of March 21, 1866.

Petitioner contends that the Seminole Nation received fee simple title by the *grant in praesenti* in the treaty of March 21, 1866, and that the Seminole title was founded upon this treaty. This treaty stated in part that: "The United States, having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation" the lands described therein. The words,

"hereby grant" denote a *grant in praesenti*. *United States* v. *Brooks*, 10 How. 442; *Leavenworth, etc., Railroad Co.* v. *United States*, 92 U. S. 733, 741; *Wright* v. *Roseberry*, 121 U. S. 488, 496. The treaty was not an agreement to grant, but embodied the grant.

The fee simple title attached to all of the 200,000-acres as described in the treaty, and remained in the Seminole Nation until there was a voluntary cession by the Seminole Nation or an appropriation of said lands by the United States.

In the case of *New York Indians* v. *United States*, 170 U. S. 1, the facts are similar to those surrounding the Seminole Treaty of March 21, 1866. In that case the New York Indians by treaty ceded to the United States certain lands in Wisconsin and purchased from the United States certain other lands in what is now the State of Kansas. In that case, this Court construed the words in the treaty "in consideration of the above cession or relinquishment, * * * the United States agree to set apart" to be a *grant in praesenti*, passing the title as of the time of the making of the treaty. In the New York Indian case also the Court held that the extent of title which the Indians received, would depend upon the intention of the United States at the time the Treaty was executed, and the Court reasoned that had the United States not intended to convey to the New York Indians an immediate title *in praesenti* in all probability it would never have secured the cession of lands in Wisconsin from the New York Indians.

By the Seminole Treaty the Seminole Nation ceded to the United States over two million acres of land, and by this same treaty purchased from the United States the 200,000-acre tract now in question. We submit that this situation is analogous to the facts surrounding the making of the treaty construed in the New York Indian case, and clearly shows that the parties intended that the title pass immediately to the Seminole Nation upon the execution of the treaty of March 21, 1866; and, as the purchase price of fifty cents an

acre, by the terms of the treaty, was deducted from the moneys due the Seminoles thereunder, the transaction was fully consummated.

Respondent suggests (Supple. Mem. Page 18) that possibly the case of *Stoneroad* v. *Stoneroad*, 158 U. S. 240, might have some bearing on this question and that the title of the Seminole Nation to the 200,000 acres might possibly depend on the survey. The case of *Stoneroad* v. *Stoneroad* surely can have no application to this case, for that case dealt with title to lands in the Mexican Territory and therein this Court held that by the necessary implication, the confirmatory act of 1860 contemplated that before any patents should issue from the United States on lands previously granted to individuals by the Mexican Government, the lands should first be surveyed. In the instant case, the title granted by the Seminole treaty did not depend upon a survey to become operative, and the making of the survey was merely an incidental obligation assumed by the respondent. Three boundaries in the description of the 200,000-acre grant were fixed by the treaty; the Creek dividing line on the east, the North Fork of the Canadian River on the north, and the Canadian River on the south, and between these three boundaries and extending so far west as to include 200,000 acres, was the Seminole domain, granted by this treaty. In other words, three of the boundaries were fixed boundaries.

Furthermore, the respondent did not consider the title of the Seminoles to be held in suspension or to depend upon a survey, and even respondent at the time, considered that title had passed upon the making of the treaty, because in the fall of 1866 it removed the Seminoles and located them on the lands of their new national domain granted by the treaty of March 21, 1866.

Furthermore, the purchase price from the whole 200,000 acres was, immediately and, by the treaty of March 21, 1866, deducted from the proceeds of the sale of the two million acres sold to the United States by the Seminoles.

Clearly title was intended to pass, and did pass by the treaty of March 21, 1866.

Did Robbins in Running the West Boundary Exclude Part of the Seminole Lands from Their Treaty Domain?

This question of fact can be determined by this Court on the record now before it. Respondent concedes (Supple. Memo. p. 17) that "we believe that there may be a shortage in the Seminole tract between the Bardwell and Robbins lines."

As early as 1900, the officials of respondent determined that there was a deficiency in the combined Seminole Domain and further determined that the deficiency was in the 200,000-acre treaty tract (R. 21-22; Supple. Memo. pp. 8-9). When the matter was before the lower court, the respondent contended that there was no deficiency in the 200,000-acre tract, and relied upon the field notes of the earlier surveys to sustain its position. In order finally to determine the question, the Department of Justice, with the consent of petitioner, requested the General Land Office to make a field examination on the ground and determine finally the question. The field examination made by A. D. Kidder, District Cadastral Engineer of the General Land Office—which was before the lower court, when this case was before it, and which it overlooked—sets forth with particularity the errors made by Robbins and shows conclusively that the Robbins survey of the west boundary excluded 10,351.82 acres from the Seminole Domain (R. 10-17).

Since three of the boundaries were fixed by the Treaty of March 21, 1866, and the showing is clearly made that 10,351.82 acres were excluded by the erroneous Robbins survey, we submit that the only right conclusion is that this strip of 10,351.82 acres lay, and was located, west of the Robbins line and between the Canadian River and the North Fork of the Canadian River. With this plain record before it, we submit that this Court would be fully justified in making the finding of fact on this point, and we further submit that to do so would save petitioner and respondent considerable time and expense in finally settling this case.

The Seminole Nation Did Not Acquiesce in the Erroneous West Boundary.

Respondent further suggests that the case be remanded to the Court of Claims to determine the issue of whether or not the parties acquiesced in the visible boundaries marked by the Bardwell and Robbins line and by such acquiescence defined the 1866 "grant." (Supple. Memo. pp. 17, 18).

This contention overlooks the fact that this is a special proceeding under a special jurisdictional act, which could result in a money judgment only. The suit is brought by the ward against its trustee, and the interests of innocent third parties are not involved. Here we are not trying to move the west boundary of the Seminole lands as it actually exists on the ground and thus upset titles-long since established in order to get back the 10,351.82 acres of Seminole lands; but in pointing out the errors made by Robbins we endeavor to show the Court that the respondent, in itself fixing this boundary, excluded 10,351.82 acres of petitioner's lands from the Seminole domain and included them in the Pottawatomie reservation, that it thereafter erroneously disposed of them as a part of the Pottawatomie lands; and that because of these errors defendant is liable to petitioner for the value of same, as for a taking under the power of eminent domain.

Several cases are cited by respondent on this question (Supple. Memo. p. 18). These cases set forth disputes between independent parties dealing as equals, and have for their purpose fixing the boundary lines on the ground and the recovery of lands in kind. These decisions, therefore, could have no application to a dispute between a trustee and its ward–parties upon an entirely different footing, the ward being dependent upon the trustee for the needed protection of its interests, and in a special proceeding which could result in a money judgment only, and in which the question is the taking of the ward's lands by the trustee (*United States* v. *Creek Nation*, 295 U. S. 103).

As pointed out by respondent (Supple. Memo. p. 18), this same question was passed upon by the Court of Claims in case No. K-334, *Chickasaw Nation* v. *United States*, decided May 5, 1941 (not as yet reported), and the question was decided adversely to respondent in that case.

Furthermore, the record does not show that petitioner acquiesced in the erroneous Robbins line. To the contrary, the record shows that when the errors first became apparent, in 1900, the Seminole Nation requested that it be given the lands to which they were entitled so that they could be included in the allotments (R. 19).

Certainly the complaint of the Seminoles requesting the full acreage due them, and imparting all the knowledge they had of these errors, was sufficient to acquaint respondent of the errors, and afforded respondent an opportunity to investigate the records solely in its possession—the same ones that are now before us—and to correct these errors. However, respondent did nothing, but permitted the matter to drift down to the time the jurisdictional act was passed authorizing this suit to be filed.

Acquiescence implies knowledge of the error, and a failure to act to correct it. In this case the Seminoles had no knowledge of the error until 1900 when they requested respondent to correct it.

Even if the Seminoles had agreed upon the Robbins west line under a mistaken apprehension that it was the true line, this would not prevent them from claiming to the true line when the error became known. 4 Ruling Case Law, p. 131; *Ulman* v. *Clark*, 100 Fed. 180, 192:

In *Schraeder Mining Co.* v. *Packer*, 129 U. S. 688, 699, this Court said:

> "The decisions in the other states generally support the rule that owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, each claiming only the true line wherever it may be found, and that in such cases neither party is precluded or estopped from claiming his own rights under the true one, when it is discovered. * * *"

The contention of respondent may be stated in another way—that the Indians are bound by the lapse of time and the statutes of limitation, the doctrine of acquiescence being based upon silence for a period of time after a knowledge of the errors in the boundaries. A complete answer to this contention is found in the terms of the special jurisdictional act of May 20, 1924, c. 162, 43 Stat. 133, which provides in part that the Court shall have jurisdiction to adjudicate and render judgment on claims presented—

> "* * * notwithstanding the lapse of time or statutes of limitation, * * *."

The statutes of limitation being expressly waived, this whole controversy is to be treated as though it had occurred just yesterday.

For the reasons above set forth we submit that there is no merit to this contention of respondent, and that the petitioner may avail itself of this, its first opportunity of presenting this claim for final settlement.

When Did the Taking of Plaintiff's Lands Occur?

Respondent suggests (Supple. Memo. p. 19) that the matter be remanded to the lower court to determine the question when, if the Seminole Nation received title to all of the 200,000 acres by the treaty of March 21, 1866, that land was taken by the respondent.

We submit that the facts in this case are similar to those in *United States* v. *Creek Nation*, 295 U. S. 103, and that the law laid down by this Court in that case is the law governing this case. That the land was not taken in 1871, when the Pottawatomies were placed on the strip of 10,351.82 acres, was decided in the *Creek* case. The Pottawatomie Treaty of 1867 does not show any intention on the part of the respondent to take Seminole lands, but directs the Pottawatomie Indians to select a location without interfering with the locations made for other Indians; likewise, the letter of the Secretary of Interior in 1870 (Appendix, Supple. Memo. of

Res., pp. 29-30) shows that there was no such intention to take Seminole lands.

Furthermore, the Pottawatomie Treaty of February 27, 1867, 15 Stat. 531, does not convey a fee simple title to the Pottawatomies, but merely the Indian "right of occupancy"; and, therefore, the cession to the Pottawatomies was not intended to convey a fee simple title either of respondent's lands or petitioner's lands. The Seminole Nation's fee simple title to the 200,000 acres vested by their treaty and this title remained in that nation until such time as respondent performed acts and made disposals, which—through a failure to correct them after full knowledge of the facts—created the taking of the title of the Seminole Nation (*United States* v. *Creek Nation*, 295 U. S. 103).

Respondent asks this Court to compare *Shoshone Tribe* v. *United States*, 299 U. S. 476, 495. This was one of the so-called "wild tribe" cases, and would have no application to the question of the taking of fee simple title which is herein involved. The "wild tribes" held merely a "right of occupancy" of their lands, the fee being in the United States; and an intrusion on and occupancy of their lands would entirely destroy their right of possession, and would give rise to a cause of action for the value of this "right of occupancy" as of the date of the intrusion. Thus the title involved in the above case was the usual "right of occupancy". When the Government intentionally moved the Arapahoes on this reservation under a military escort and placed them in possession of part of the Shoshone lands, such acts divested the Shoshones of any and all the rights they had in the lands thereafter occupied by the Arapahoes, and the Shoshones' cause of action arose at that time, as everything that had been previously granted them was then intentionally taken. Furthermore, the United States took the land with full knowledge that such lands belonged to the Shoshone Tribe of Indians. It was a direct, intentional, and complete taking in 1878 when the Government moved in the Arapahoes.

In this case the Seminole Nation held the fee simple title to the lands in question, and by the treaty of March 21, 1866, was guaranteed quiet possession thereof, and any intrusion upon the Seminole lands, or any occupancy of said lands by any intruder, or other tribe, would not operate to divest the Seminole Nation of its fee simple title.

In the instant case the fact that Seminole lands were excluded from their domain was inadvertent, and was not discovered until years later, in 1900. After the survey sectionalizing the land was made by the Geological Survey, both petitioner and respondent became apprised of the error. This respondent concedes (Supple. Memo. p. 8). Therefore, there could be no intent by respondent to take the Seminole fee simple title to these lands, until such time as it had full knowledge, or ample means of knowledge, that the Robbins survey was erroneous, and that it was erroneously issuing fee simple patents on lands, which it had previously granted to petitioner by the Treaty of March 21, 1866, and then failed to take steps to correct them, thus confirming them.

When patents were erroneously issued to petitioner's lands, pursuant to the Act of 1891, and when the errors became apparent, and respondent failed to cancel patents already erroneously issued, and continued to issue more patents on the land in question, thus confirming them, and the taking is fixed as of the date of the patents. This is petitioner's position and we submit that it is clearly governed by the Creek case, *supra*.

Was the 175,000 Acre Tract a Gratuity?

The question concerning the 175,000 acre tract is also involved in *Seminole Nation* v. *United States*, No. 348, this Term.

Respondent now contends (Supple. Memo. p. 21; Resp. Br. Case No. 348, pp. 72-80) that the acquisition of the 175,000-acre tract for the Seminoles was a gratuity, and that it should have an allowance of $175,000.00 as a gratuity offset,

which was the amount paid by the respondent to the Creek Nation for this land.

This 175,000-acre tract was used by the lower court in this case and also in case No. 348, the result being that respondent was given credit for this item in two different cases, in two different amounts, and all this was done by two different processes and methods. We do not believe respondent contends that it should have more than one allowance for this item, and therefore confine our argument solely to the question of whether or not this 175,000-acre tract involved an element of gratuity.

We have therefore contended and shown (Pet. Br. pp. 22-31) that this $175,000.00 was not a gratuity, but was an item of reparation, disbursed to repair a wrong done by respondent to the Seminole Nation. This contention we submit is correct, right and just.

In addition to reasons heretofore set forth (Pet. Br. pp. 22-31) petitioner directs the attention of the Court to the question of the *intent of Congress* at the time the 175,000-acre tract was purchased from the Creeks and turned over to the Seminole Nation. Did Congress intend to make a gift of this tract to the Seminole Nation, or did Congress intend to turn this tract over to the Seminole Nation for the purpose of repairing a wrong done, and with the intention of compensating them in some measure for the wrong?

When a claim is made by one party against another for a contractual breach or for a tortious wrong, and in the process of settlement, the injured party receives a compensatory recovery, can it be said that under such circumstances, the compensatory recovery is to be considered as a gift or gratuity?

We submit that the logical answer to these questions in the light of the circumstances would affirm petitioner's contention that the $175,000 item was not a gratuity, but was merely reparation, and that it was so intended and determined by Congress.

Should the Court decide the questions above enumerated in accordance with the views of petitioner, the case could then be remanded to the lower court with directions to determine the value of the Seminole lands in question as of the dates of the issuance of patents thereto, and further to award just compensation in accordance with the rule laid down in *United States* v. *Creek Nation*, 295 U. S. 103.

Respectfully submitted,

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No. 830

In the Supreme Court of the United States

OCTOBER TERM, 1941

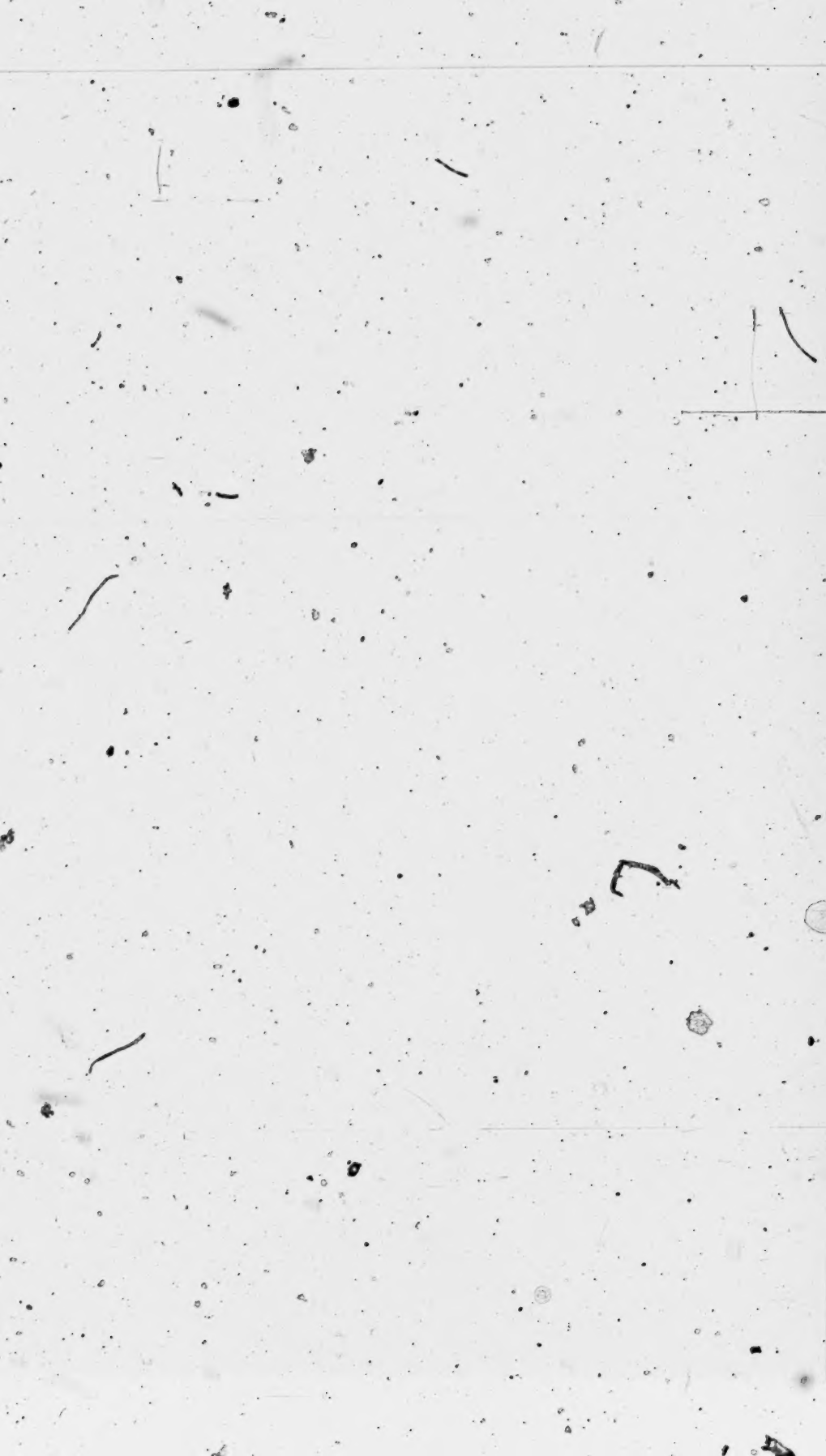
THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES



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No. 830

THE SEMINOLE NATION, PETITIONER

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinions of the Court of Claims are not yet reported. They appear at pages 8 and 9 of the Record.

JURISDICTION

The judgment of the Court of Claims was entered on May 5, 1941 (R. 9–10). A motion by petitioner for new trial was denied by the court on October 6, 1941 (R. 10). The petition for certiorari was filed December 31, 1941. The jurisdiction of this Court is invoked under section 3 of the Act of February 13, 1925, 43 Stat. 936, 939,

as amended by the Act of May 22, 1939, 53 Stat. 752.

QUESTION PRESENTED

Whether the United States has taken from the Seminole Nation part of the lands granted by the Government to the Nation in Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756, and must therefore make compensation to the Seminoles under the rule of *United States* v. *Creek Nation*, 295 U. S. 103.

STATUTES INVOLVED

The relevant statutory and treaty provisions are set forth in the Appendix, *infra*, pp. 10–11.

STATEMENT

By Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756, the United States granted to the Seminole Nation a tract of land, situated between two streams, which should be bounded on the east by the western limit of the territory of the Creek Nation (a boundary then undetermined) and on the west by a line drawn at such a distance from the eastern boundary that the tract would comprise 200,000 acres. Late in 1866, before the boundaries of the Seminole domain had been located, the Seminole Indians moved to what was assumed to be the granted tract (R. 7).

In 1868 the Commissioner of Indian Affairs directed one Rankin to survey the Creek-Semi-

nole boundary (R. 17); Pet. Br., *The Seminole Nation* v. *The United States,* No. 348, this Term, p. 43). When this dividing line had been surveyed those Seminoles who had settled to the east moved west of the Rankin line (R. 17). After the Creeks had objected that the Seminole eastern boundary should have been located farther to the west, one Bardwell in 1871 resurveyed the dividing line, fixing it several miles west of the Rankin line; Bardwell's survey was approved by the Secretary of the Interior on February 5, 1872 (R. 7). Two months following Bardwell's survey the Government directed one Robbins to run the western boundary of the Seminole territory, so as to include 200,000 acres from the eastern boundary (R. 7). This survey also was approved by the Secretary of the Interior on February 5, 1872 (R. 7).

Bardwell's survey had disclosed that a considerable area east of the Seminole-Creek dividing line had been occupied by Seminoles, who had made substantial improvements on this land. In order that the Seminoles might retain the lands which they had improved, Congress authorized the Secretary of the Interior to negotiate with the Creeks for the purchase of these lands. Act of March 3, 1873, 17 Stat. 626. On February 14, 1881, the Secretary entered into an agreement with the Creeks whereby the latter nation ceded to the United States land east of the Bardwell

line, the agreement providing that the eastern boundary of the land ceded should be so drawn that the tract would aggregate 175,000 acres. See *Creek Nation* v. *United States,* 93 C. Cls. 561, 566.[1] The United States paid the Creeks $175,000 for this tract. Act of August 5, 1882, 22 Stat. 257, 265 (appropriation). The land thus ceded became a part of the Seminole reservation and was disposed of either by allotment to members of the tribe or by sale for account of the tribe. Record, *The Seminole Nation* v. *The United States,* No. 348, this Term, pp. 16–17.

By Article I of the Treaty of February 27, 1867, 15 Stat. 531, the United States agreed that a delegation from the Pottawatomie Tribe of Indians should accompany a government commission to the Indian country—

> * * * in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the In-

[1] Later the Creeks claimed that the tract comprised more than 175,000 acres, and sued to recover compensation for the excess, alleging it to be 2,397.71 acres. The Court of Claims found that it was 1,198.99 acres, but denied recovery because the Creeks had intended to convey the whole tract for the consideration of $175,000 and because cession of the whole was ratified by an agreement of January 19, 1889, 25 Stat. 757. *Creek Nation* v. *United States,* 93 C. Cls. 561, 570–571.

> terior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation: * * *

The Pottawatomie Tribe selected lands immediately west of the Seminole domain (as determined by the Robbins line) (Pet. 7); these were set aside for the purpose by the Secretary of the Interior on November 9, 1870, and were occupied by the Indians in 1872 (R. 3). Subsequently, the United States allotted and patented the lands to the Pottawatomies in severalty or sold and patented them to settlers under the homestead laws (R. 7).

By 1900 it appeared that there might be a shortage in the area of Seminole territory originally intended to be enclosed between the Bardwell and Robbins lines (R. 21–22). In an amended petition filed in the Court of Claims in the present proceedings in 1937 the Seminole Nation alleged that owing to an error in location of the Robbins line the tract was 11,550.54 acres short of 200,000 acres, and that the United States had taken from the Seminoles 11,550.54 acres west of the Robbins line when the Government patented that land to individuals in 1891 and after;

petitioner then prayed judgment against the United States for the value at the time of taking of the 11,550.54 acres, with interest at 5 per centum per annum (R. 3–5). The United States filed a general traverse to the petition and asked that it be dismissed (R. 5). The Court of Claims made no finding whether a shortage in fact existed in the tract between the Robbins and Bardwell lines (R. 7), but held that in any event the Seminole Nation had been more than compensated for the alleged shortage by the Government's purchase in 1882 for the Seminoles of over 175,000 acres ceded by the Creek Nation (R. 8–9). The court also stated (R. 9) that even if petitioner were entitled to recover for the taking of a part of the 200,000-acre tract originally agreed upon the Government would be entitled to offset the value of the additional land east of the Bardwell line which the Seminoles received in 1882 as a gratuity under Section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596. The petition was accordingly ordered dismissed on May 5, 1941 (R. 9–10). Petitioner's subsequent motion for a new trial, filed July 10, 1941, was overruled on October 6, 1941 (R. 10). The petition for certiorari was filed December 31, 1941.[2]

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[2] During the trial in the Court of Claims a new survey was undertaken by Arthur D. Kidder pursuant to instructions of the General Land Office (R. 10). Kidder concluded in his report that a shortage of 10,351.82 acres existed in the Seminole tract west of the Bardwell line (R. 16). Correspond-

DISCUSSION

The Government does not oppose the granting of the petition for certiorari in this case because the claim presented and defenses interposed against it are involved as an issue in a kindred case in which this Court has authorized review, *The Seminole Nation* v. *The United States*, No. 348, this Term, certiorari granted, October 13, 1941.

There the Seminole Nation filed a petition in the Court of Claims to recover upon claims other than the one here presented. In addition to contesting those claims, the Government advanced a number of items as gratuity offsets under Section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596. Among these it included a claim for gratuity offset based on the purchase by the United States for the Seminoles from the Creek Nation in 1882 of the approximately 175,000 acres of land which lie between the Bardwell line and present Creek Territory. The Court of Claims found (93 C. Cls. 500, 511) that the United States had expended $177,397.71 for this land.[3] The

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ingly, in the petition for certiorari petitioner has limited its claim for compensation to the value of 10,351.82 acres at the time of the alleged taking (Pet. 4, 9, 12, 13).

[3] In *Creek Nation* v. *United States*, 93 C. Cls. 561, the petitioner had sought to recover compensation from the United States for 2,397.71 acres of land alleged to have been included by mistake in the 175,000-acre tract which the Creeks had ceded to the United States for the Seminoles. The Court there determined the excess to be 1,198.99 acres rather than 2,397.71 acres, but held that no recovery could be

court held (*id.* at 526) that it was a gratuitous expenditure within the provisions of the 1935 statute, deducted $11,550.54 from the $177,397.71 to allow for the shortage alleged by the Seminole Nation to exist in the 200,000-acre tract (valuing the land in each tract at $1 per acre), and allowed to the Government an offset of the difference: $165,847.17.

The Court of Claims in that case examined claims of the Nation totalling $1,153,022.72, and concluded that the United States was liable to the extent of $18,388.30; against that liability the court allowed gratuity offsets of $705,337.33 (93 C. Cls. 537). In this Court the Seminole Nation challenges the action of the Court of Claims in denying the remaining claims and in allowing certain items as gratuity offsets (including the $165,847.17 for the land given to the Seminoles in 1882).

Because of the connection between the question in the present case and that concerning the related gratuity offset in *The Seminole Nation* v. *The United States*, No. 348, this Term, the Government does not oppose the granting of certiorari herein. In the event that the writ is granted, the Govern-

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allowed. See n. 1, p. 4, *supra*. The Court of Claims probably arrived at the figure of $177,397.71 in the present case by adopting inadvertently the allegations of the Creek Nation's petition concerning the excess of acreage and by assuming that the Government paid $1 per acre for 177,397.71 acres. Cf. n. 1, p. 4, *supra*. As stated at page 4, *supra*, the United States expended $175,000 for the tract.

ment suggests that the two cases be set down for argument consecutively on the docket.

Respectfully submitted.

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NORMAN M. LITTELL,
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Attorneys.

FEBRUARY 1942.

APPENDIX

Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756, between the United States and the Seminole Nation provides, in part:

> * * * The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. * * *

Article I of the Treaty of February 27, 1867, 15 Stat. 531, between the United States and the Pottawatomie Tribe of Indians provides, in part:

> It being the intention of the government that a commission shall visit the Indian country as soon as practicable after the ratification of the treaties contemplating the removal of certain tribes from Kansas,

accompanied by delegates from the several tribes proposing to remove, it is agreed that a delegation of the Pottawatomies may accompany said commission in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation: * * *

Section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596, provides, in part:

> In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1948

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OCTOBER TERM, 1941

THE SEMINOLE NATION, PETITIONER

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THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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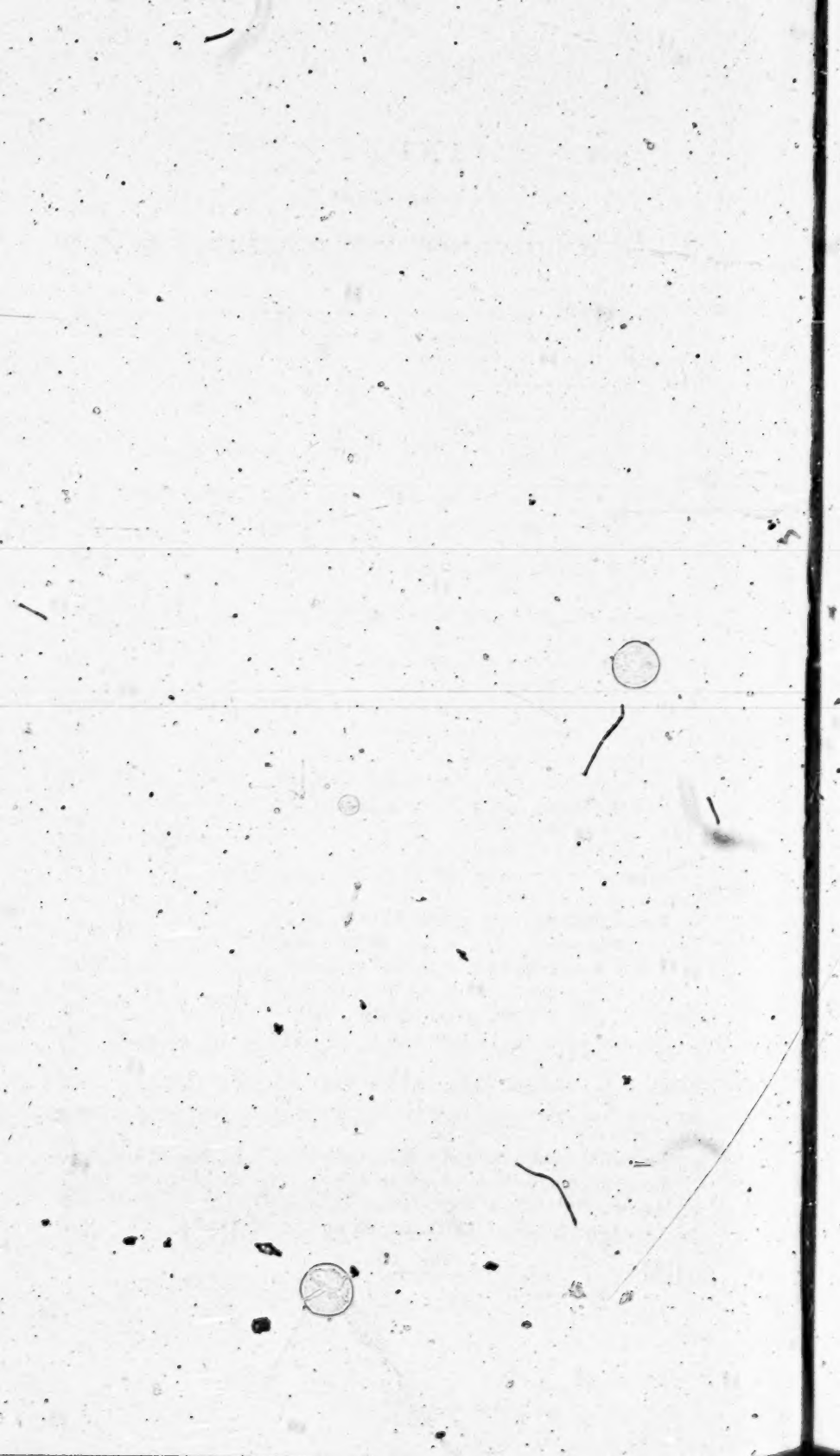

In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinions of the Court of Claims (R. 8–10) are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 5, 1941 (R. 9–10). A motion by petitioner for a new trial was denied October 6, 1941 (R. 10). The petition for certiorari was filed December 31, 1941, and was granted on February 16, 1942. The jurisdiction of this Court is invoked under section 3 of the Act of February 13, 1925, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, 53 Stat. 752.

QUESTION PRESENTED

Whether the United States remains under any obligation to the Seminole Nation with respect to execution of the provision of Article III of the treaty of March 21, 1866, for granting a tract of 200,000 acres of land to the Seminoles.

STATUTES INVOLVED

The relevant statutory and treaty provisions are set forth in the Appendix, *infra*, pp. 23–30.

STATEMENT

By Article III of the treaty of March 21, 1866, 14 Stat. 755, 756, the Seminole Nation ceded and conveyed to the United States its entire domain in the Indian Territory in consideration of the payment by the Government of $325,362. The same article went on to provide:

> * * * The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Ca-

nadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, * * *.

These provisions refer to the treaty with the Creek Nation as if it were already in effect. Although negotiations with the Creeks were in progress at the time the Seminole treaty was made, in fact the Creek treaty was not concluded until June 14, 1866,[1] and the dividing line between the halves of the Creek country was still undetermined on March 21, 1866.[2] Late in 1866, before

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[1] The treaty of June 14, 1866, between the United States and the Creek Nation appears in 14 Stat. 785.

[2] The chronology of events with respect to the Seminole and Creek treaties of 1866 is set forth as follows in the Report of the Commissioner of Indian Affairs, 1881, p. LIV:

"In explanation of the discrepancy in the dates of the Creek treaty above given, it should be stated that after the treaty of February 6, 1866 was made and forwarded to the President for ratification by the Senate, objections were made by the delegates representing the Southern Creeks to certain stipulations not therein contained; that two subsequent treaties, dated, respectively May 9 and May 21, 1866, were prepared, covering the objectionable features of the former treaty; but not until the 14th of June, 1866, was a satisfactory treaty presented that all the delegates were willing to sign. In the meantime the Seminole treaty was made."

the boundaries of the Seminole domain had been located, the Seminoles moved to what was assumed to be the treaty land (R. 7).

On December 28, 1867, the Superintendent of Indian Affairs made a contract with one Rankin to survey the line dividing the two halves of the Creek country,[3] as provided in Articles III and VIII of the Creek treaty, 14 Stat. 785, 786, 788. When located, this line was to become the western boundary of the Creek domain and the eastern boundary of the 200,000-acre tract purchased by the Seminoles. When this dividing line had been surveyed those Seminoles who had settled to the east moved west of the Rankin line (R. 17). While the line fixed by Rankin appeared to be generally satisfactory to the Seminoles, the Creeks complained that it placed the division too far east. The Rankin survey did not receive approval from the Department of the Interior, presumably because of the objections made by the Creeks.

In 1871 the line dividing the Seminole and the Creek territories was resurveyed by one Bardwell. This survey, which was approved by the Secretary of the Interior on February 5, 1872, fixed the dividing line seven miles west of the Rankin line (R. 7). Two months after Bardwell's survey, the Government directed one Robbins to run the west-

[3] Report of the Commissioner of Indian Affairs, 1881, p. LIV.

ern boundary of the Seminole lands, so as to include 200,000 acres from the eastern boundary. This survey also was approved by the Secretary on February 5, 1872 (R. 7).

Meanwhile, by Article I of the treaty of February 27, 1867, 15 Stat. 531, the United States agreed that a delegation from the Pottawatomie tribe of Indians should accompany a government commission to the Indian country—

> * * * in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation. * * *

The Pottawatomie tribe selected a tract bounded on the east "by the West line of the Seminole lands", and on November 9, 1870, the Secretary of the Interior approved the selection, directing, however, that until that west line was surveyed and marked the Pottawatomies should locate far

enough west of the Seminoles to avoid intrusion upon the Seminole lands.[4] In 1872 the Pottawatomies occupied the territory immediately west of the Robbins line (R. 3). Subsequently, the United States allotted and patented the lands west of the Robbins line to the Pottawatomies in severalty or sold and patented them to settlers under the homestead laws (R. 7). Act of May 23, 1872, 17 Stat. 159; Act of February 5, 1887, 24 Stat. 388–391; Act of March 3, 1891, 26 Stat. 989, 1016, 1017.

Bardwell's survey had disclosed that a considerable area east of the Seminole-Creek dividing line had been occupied by Seminoles, who had made substantial improvements on this land (R. 7–8; Report of the Commissioner of Indian Affairs, 1881, p. LV). When the Creeks learned that the Seminoles had settled in part upon unceded Creek land, they claimed and began to exercise jurisdiction over all of the area up to the Bardwell line. The Seminoles, fearing loss of their improvements and the lands on which these had been made, appealed to the Government for protection and relief, requesting that they be permitted to keep the land on which they had settled.[5] Their appeal at once brought response from the Government, which informed the Creeks that

[4] See letter of the Secretary of the Interior, dated November 3, 1870, to the Commissioner of Indian Affairs. This letter is set forth in the Appendix, *infra*, p. 29.

[5] See Report of the Commissioner of Indian Affairs, 1881, p. LV; Report of the Secretary of the Interior, 1872, p. 625.

until the boundary question was settled by the Department of the Interior the Seminoles must be left undisturbed.[6]

In order that the Seminoles might retain the lands which they had improved, Congress authorized the Secretary of the Interior to negotiate with the Creeks for the purchase of these lands east of the Bardwell line. Act of March 3, 1873, 17 Stat. 626. On February 14, 1881, the Secretary entered into an agreement with the Creeks whereby the latter Nation ceded to the United States land east of the Bardwell line, the agreement providing that the eastern boundary of the land ceded should be so drawn that the tract would aggregate 175,000 acres. See *Creek Nation* v. *United States*, 93 C. Cls. 561, 566.[7] In 1881 the Commissioner of Indian Affairs recommended an appropriation of $175,000 for the purchase, the land to be held for the use of the Seminole Nation provided it relinquish a like quantity in the west to the United States.[8] The United States paid the

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[6] Report of the Commissioner of Indian Affairs, 1873, pp. 145, 152.

[7] Later the Creeks claimed that the tract comprised more than 175,000 acres, and sued to recover compensation for the excess, alleged to be 2,397.71 acres. The Court of Claims found that it was 1,198.99 acres, but denied recovery because the Creeks had intended to convey the whole tract for the consideration of $175,000 and because cession of the whole was ratified by agreement of January 19, 1889, Act of March 1, 1889, c. 317, 25 Stat. 757. *Creek Nation* v. *United States*, 93 C. Cls. 561, 570–571.

[8] See Sen. Doc. No. 75, 47th Cong., 1st Sess., p. 2 (1882).

Creeks $175,000 for the tract east of the Bardwell line. Act of August 5, 1882, 22 Stat. 257, 265 (appropriation). Congress in the appropriation act omitted to provide any requirement that the Seminoles relinquish land in the west in return for the tract newly obtained from the Creeks. This land became a part of the Seminole reservation and was disposed of either by allotment to members of the tribe or by sale for the account of the tribe. See Act of July 1, 1898, 30 Stat. 567; Record, *Seminole Nation* v. *United States*, No. 348, this Term, pp. 16–17.

A survey completed by the United States Geological Survey shortly before 1900 indicated that there was a shortage in the total area of Seminole lands, so that the two Seminole tracts aggregated less than 375,000 acres (R. 19–20). The Seminoles complained of the alleged shortage in a letter dated January 17, 1900, addressed to the Commissioner of Indian Affairs, stating that the Seminoles were entitled to receive additional land (R. 19). Apparently it was assumed by the Seminoles that the shortage occurred by reason of an erroneous survey of the 175,000-acre tract purchased from the Creeks in 1882 (R. 19–22). The Department of the Interior on August 24, 1900, directed the Commissioner of the General Land Office to inquire into the alleged shortage (R. 21). On October 10, 1900, the Commisisoner replied that the 175,000-acre tract had been carefully sur-

veyed in 1888, on the basis of the Bardwell line, and that if any deficiency existed in the total Seminole territory it was the result of error in surveying the original 200,000-acre tract (R. 21–22). The Acting Secretary of the Interior on October 16, 1900, communicated the substance of this report to the United States Commission to the Five Civilized Tribes in the Indian Territory, concluding that the Seminoles were not entitled to have further lands segregated for them from the Creek Nation (R. 21, 22).

In an amended petition filed in the Court of Claims in the present proceedings in 1937, the Seminole Nation alleged that owing to an error in location of the Robbins line, the territory originally intended to be enclosed between the Bardwell and Robbins lines was 11,550.54 acres short of 200,000 acres, and that the United States had taken from the Seminoles 11,550.54 acres west of the Robbins line when the Government patented that land to individuals in 1892 and after; petitioner then prayed judgment against the United States for the value at the time of taking of the 11,550.54 acres, with interest at five per centum per annum (R. 3–5).[9] The United States

[9] During the trial in the Court of Claims a new survey was undertaken by Arthur D. Kidder pursuant to instructions of the General Land Office, which were issued January 14, 1941, on request of the Department of Justice made in a letter dated January 3, 1941 (R. 10–11). Kidder concluded in his

filed a general traverse to the petition and asked that it be dismissed (R. 5). The Court of Claims made no finding whether a shortage in fact existed in the tract between the Robbins and Bardwell lines (R. 7), but held that in any event the Seminole Nation had been more than compensated for the alleged shortage by the Government's purchase in 1882 for the Seminoles of over 175,000 acres ceded by the Creek Nation (R. 8–9). The court also stated (R. 9) that even if petitioner were entitled to recover for the taking of a part of the 200,000-acre tract originally agreed upon the Government would be entitled to offset the value of the additional land east of the Bardwell line which the Seminoles received in 1882, as a gratuity under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596. The Court of Claims accordingly ordered the petition dismissed on May 5, 1941 (R. 9–10). Petitioner's subsequent motion for a new trial, filed July 10, 1941, was overruled on October 6, 1941 (R. 10). The petition for certiorari was filed December 31, 1941, and was granted February 16, 1942. (R. 36).

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report that a shortage of 9,152.83 acres existed in the intended 375,000-acre total area of Seminole lands. According to his calculations the 175,000-acre tract contained an excess of 1,198.99 acres, while there was a deficiency of 10,351.82 acres in the 200,000-acre tract (R. 16). Accordingly, in the petition for certiorari petitioner limited its claim for compensation to the value of 10,351.82 acres at the time of the alleged taking (Pet. 4, 9, 12, 13).

DISCUSSION

Petitioner has grounded its suit on the theory that Article III of the treaty of March 21, 1866, 14 Stat. 755, 756, effected a grant *in praesenti*, vesting title to 200,000 particular acres of land in the Seminole Nation, prior to location of the granted lands by survey.[10] Starting with this premise, petitioner alleged that, owing to an error in the location of the Robbins line, the tract was short of 200,000 acres, and that the Government took from the Seminoles a strip west of the Robbins line when it patented the Pottawatomie territory to individuals between 1892 and 1927.

Petitioner has contended that its rights are unaffected by the fact that the United States in 1882 purchased for the Seminoles approximately 175,000 acres additional on the east. It has argued that the transactions through which the shortage on the west boundary occurred are distinct from those which resulted in the addition on the east, and that if the addition of territory on the east can be considered at all, it can only form the basis for an offset under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596, which directs that funds expended gratuitously for the benefit of an Indian tribe be offset against any liability of the United States determined by the Court of Claims.

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[10] Since the United States did not acquire title from the Creek Nation to the land in question until June 14, 1866, the latter date was the earliest on which a vesting could have occurred.

Accordingly, petitioner demanded judgment for the value of the strip west of the Robbins line as of the dates of the patents (1892–1927), rather than as of the date of the occupation by the Pottawatomies (1872), in the amount of $361,633.11,[11] together with interest (estimated at $610,000.00 as of the present time), or a total of $971,633.11. The treaty price of the Seminole land, paid to the United States pursuant to Article III of the treaty of March 21, 1866, was fifty cents per acre; on this basis the value of a strip containing 10,351.82 acres was $5,175.91 in 1866.

In the court below the Government made three arguments. Its first contention was that the petitioner had failed to establish a shortage in the 200,000-acre tract. Next, the Government urged that even if there was a shortage the petitioner could not recover because since 1872 the Seminole Nation had recognized and treated the Robbins line as the true western boundary of its domain. The Government's third argument was that if lands had been taken from the Seminoles the taking occurred in 1872 when the Pottawatomies were placed in possession of the lands west of the Robbins line rather than when patents were issued beginning in 1892.

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[11] This figure is taken from petitioner's request for findings of fact filed in the Court of Claims December 5, 1938; that request was based on an assumed deficiency of 11,550.54 acres.

As has been stated (page 10, *supra*), the Court of Claims made no finding whether a shortage in fact existed in the tract between the Robbins and Bardwell lines, but held that even if the alleged shortage existed the Seminole Nation had been compensated fifteenfold by the Government's purchase in 1882 for the Seminoles of over 175,000 acres ceded by the Creek Nation. The court further held that if petitioner were entitled to any monetary recovery the Government would be entitled to offset the value of the additional land east of the Bardwell line which the Seminoles received in 1882, as a gratuity under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596.

1. The Government believes that the judgment below, dismissing the petition of the Seminole Nation, is not sustainable on the second ground advanced in the opinion of the majority of the Court of Claims. The Act of August 12, 1935, directs the Court of Claims in suits by an Indian tribe or band "to consider and to offset against any amount found due the * * * tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band." As this language makes plain, the Court of Claims must first find that money is due from the United States and, having so found, must then consider whether the United States has gratuitously spent sums for the benefit of the tribe and, if it finds such gratuitous

expenditures, offset them against the amount found due.

In the present case the Court of Claims did not find whether the United States was under any liability to the Seminole Nation and, if so, the amount of liability. The majority opinion only stated (R. 9) that the value of the offset was "far in excess of the value of whatever deficit [of land] there may have been." While this, together with earlier statements in the opinion, implies that the court assumed a shortage of about 11,550.54 acres and that the court held the consequent liability of the United States to be very much less in amount than $175,000 (probably $11,550.54), we think that the process of determination followed by the court in arriving at the dismissal of the petition below did not accord with the requirement of the offset statute.

The Seminole Nation has brought a number of suits against the United States. All amounts gratuitously expended by the United States for the benefit of that Nation constitute a fund upon which the Government can draw whenever in any suit the Court of Claims finds that the Government has incurred a liability to the Seminoles. If in respect of a particular suit the Government owes nothing, it is entitled to a judgment of dismissal on that ground and should not be compelled to use gratuity expenditures. And when the Government is under

liability, and the amount has been found by the Court of Claims, the Government should not be held to satisfy its liability by the use of gratuity expenditures in excess of the liability. Conversely, the Seminole Nation is entitled to have an exact determination of the amount owed it by the United States on a cause of action in order that an amount of gratuity expenditures equal to the liability be exhausted, or that, if a sufficient amount of offsets is not available, it receive a money judgment for the difference.

2. The judgment below could be sustained on the first ground of decision advanced by the Court of Claims. The court pointed out that while the Seminoles were entitled under the treaty of 1866 to acquire 200,000 acres of land they had in fact received at least 360,000 acres, and the court held that even though there might have been a deficit in the 200,000-acre tract the petitioner was compensated therefor "fifteenfold" by the Government's gift of an additional 175,000 acres. Underlying this ground of denying recovery to petitioner was the theory that the acquisition of land by the Seminoles under the treaty of 1866 and the acquisition of additional land to the east by transfer from the Creeks should be regarded as an integral transaction for the purpose of determining whether the United States has incurred any liability with respect to the 200,000-acre tract, in view of the course of events preceding the Creek cession in 1882; if the

two acquisitions are so regarded, the treaty provision was in substance carried out, leaving the Seminoles with 200,000 acres of land and approximately 165,000 acres additional.[12]

However, the Government does not believe that this interpretation accords with the facts. The transfer of 175,000 acres to the Seminoles in 1882 was not considered as made in execution of the 1866 treaty but as a measure of grace to relieve hardship which would otherwise result from Rankin's mislocation of the Creek dividing line.[13] See Sen. Doc. No. 75, 47th Cong., 1st sess., p. 2 (1882). And in 1882 no shortage had yet been disclosed in the tract of land between the Bardwell and Robbins lines.

While the addition of 175,000 acres to petitioner's reservation gave the Seminoles much more land than they bought, the gift did not divest them of any rights acquired under the treaty unless, in con-

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[12] On this theory, the disposition by the Court of Claims of the present case would be consistent with its disposition in Finding 10 of *Seminole Nation* v. *United States*, No. 348, this Term. Cf. Brief for the United States, pp. 72–80. There the court allowed the Government a gratuity offset of $165,847.17 with respect to the 175,000-acre tract, having deducted 11,550.54 acres from the 177,297.71 acres which it found in the 175,000-acre tract and computing the price of difference at $1.00 per acre. See *infra*, pp. 19–21.

[13] In *Seminole Nation* v. *United States*, No. 348, this Term, in support of the holding of the Court of Claims that the $175,000 constituted a gratuitous expenditure, the Government argues (Br. 76–80) that it was under no obligation to make the expenditure.

nection with the gift, they released to the United States. However, no express release was made, nor would there seem to have occurred an implied release. Cf. *United States* v. *Santa Fe Pacific R. R.*, No. 23, this Term (decided December 8, 1941). A release would be implied only in the event that the 175,000-acre tract was bought and transferred to compensate for a deficiency in the 200,000-acre tract under the treaty of 1866. There is no basis for this implication because, at the time the Government purchased the 175,000 acres, there had been no suggestion of a shortage in the original area of land.

3. It is also the position of the Government that on the basis of the record before this Court, the Court should not be asked to affirm or modify the judgment below on other grounds, not disposed of by the Court of Claims in its findings and conclusions. We believe that there may be a shortage in the Seminole tract between the Bardwell and Robbins lines. Accordingly, the Government submits that the cause should be remanded to the Court of Claims for a determination by that court:

(a) Whether a deficiency exists and, if so, the extent of shortage.

(b) Whether the parties to the treaty of March 21, 1866, acquiesced in the visible boundaries marked by the Bardwell and Robbins lines and thus defined the 1866 "grant" by their conduct as extending only to the tract enclosed by those lines

and the two rivers. If there was such acquiescence, we think petitioner would have no claim against the United States for any shortage. *United States* v. *Stone*, 2 Wall. 525, 536–537; *Missouri* v. *Iowa*, 7 How. 659; *Virginia* v. *Tennessee*, 148 U. S. 503, 522–523; *Maryland* v. *West Virginia*, 217 U. S. 1, 40–41; *New Mexico* v. *Colorado*, 267 U. S. 30, 40; *Oklahoma* v. *Texas*, 272 U. S. 21, 44; *Knowles* v. *Toothaker*, 58 Me. 173, 175. But cf. *Chickasaw Nation* v. *United States* (C. Cls., decided May 5, 1941).[14]

(c) Whether, if there is a deficiency in which the parties have not acquiesced, the Seminole Nation received *title* in 1866 to land west of the Robbins line. Since the provisions of the treaty of March 21, 1866, contemplated a survey of the land purchased by the Seminoles in the west half of the Creek country, we think that the Seminole Nation acquired *title* later and only to the tract encompassed by the official surveys. Cf. *Stoneroad* v. *Stoneroad*, 158 U. S. 240. In that view of the case, petitioner acquired a cause of action against the United States, after the Robbins line was surveyed, for breach of the treaty to convey 200,000 acres of land between the Canadian River and its north fork; petitioner's suit, then, would properly be one for damages rather than compensation for land taken by the Government. Compare *Choctaw Na-*

[14] This last case is still pending in the Court of Claims under Rule 39a of that court.

tion v. *United States*, 119 U. S. 1, with *United States* v. *Creek Nation*, 295 U. S. 103. The measure of recovery would differ correspondingly, since petitioner would not be entitled to interest on the damages awarded for contractual default, while it would be entitled to interest on the value of land taken (from the time of the taking) as an element of just compensation. Accordingly, we think that under this theory of the case the Court of Claims should fix the liability of the United States for damages.

(d) Whether, if the Seminole Nation by virtue of the treaty of 1866 then acquired title to land west of the Robbins line and that land was, in consequence, subsequently taken by the Government, the taking occurred in 1872 (when the Pottawatomie Indians were placed in possession) or in 1892 and subsequent years (when patents to the lands were issued to individual Indians and to settlers under the homestead laws). Cf. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 495.

4. The disposition of the present case which we have suggested in the preceding section of this memorandum accords with the Government's position in *Seminole Nation* v. *United States*, No. 348, this Term. There the Seminole Nation filed a petition in the Court of Claims to recover upon claims other than the one here presented. In addition to contesting those claims, the Government advanced a number of items as gratuity offsets under

section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596. Among these it included a claim for gratuity offset based on the purchase by the United States for the Seminoles from the Creek Nation in 1882 of the approximately 175,000 acres of land which lie between the Bardwell line and present Creek territory. The Government, conceding a shortage of 11,550.54 acres in the 200,000-acre tract, claimed an offset of $165,847.17 for the land transferred in 1882. The court found (93 C. Cls. 500, 561) that the United States had expended $177,397.71 for this land.[15] It deducted 11,550.54 acres of land (shortage) from the 177,397.71 acres ceded by the Creeks in 1882, found the difference to be 165,847.17 acres, and on the assumption that this land had cost the United States $1.00 per acre allowed a gratuity offset of $165,847.17; the court's theory was that the excess in the ceded tract over 11,550.54 acres was gratuitously fur-

[15] In *Creek Nation* v. *United States*, 93 C. Cls. 561, the petitioner had sought to recover compensation from the United States for 2,397.71 acres of land alleged to have been included by mistake in the 175,000-acre tract which the Creeks had ceded to the United States for the Seminoles. The Court there determined the excess to be 1,198.99 acres rather than 2,397.71 acres, but held that no recovery could be allowed. See n. 7, p. 7, *supra*. The Court of Claims probably arrived at the figure of $177,397.71 in the present case by adopting inadvertently the allegations of the Creek Nation's petition concerning the excess of acreage and by assuming that the Government paid $1 per acre for 177,397.71 acres. As stated at pages 7-8, *supra*, the United States expended $175,000 for the tract.

nished by the United States to the Seminoles (93 C. Cls. 500, 525, 526).

The Court of Claims in that case examined claims of the Nation totalling $1,153,022.72, and concluded that the United States was liable to the extent of $18,388.30; against that liability the court allowed gratuity offsets of $705,337.33 (93 C. Cls. 537). In this Court the Seminole Nation challenges the action of the Court of Claims in denying the remaining claims and in allowing certain items as gratuity offsets (including the $165,847.17 for the land given to the Seminoles in 1882). The Government there takes the position that $175,000 was expended by the United States in 1882 for the additional Seminole land, that this sum was expended gratuitously, and that no amount should have been deducted from the $175,000 in computing the corresponding offset;[16] since the Court of Claims allowed only a smaller amount, any error in its computation favors the Seminole Nation and affords no ground for complaint on the part of petitioner.

CONCLUSION

The Government is of opinion that the judgment below cannot be supported on either of the grounds stated in the opinion of the Court of Claims. We believe also that the judgment cannot be affirmed on other grounds, or, if necessary, properly modified,

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[16] See Brief for the United States, *Seminole Nation* v. *United States*, No. 348, this Term, pp. 74–80.

without additional findings. It is therefore respectfully submitted that the judgment should be reversed and the cause remanded to the Court of Claims for the appropriate resolution of one or more of the issues set forth in the third section (*supra*, pages 17–19) of this memorandum.

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MARCH 1942.

APPENDIX

Article III of the treaty of March 21, 1866, 14 Stat. 755, 756, between the United States and the Seminole Nation, provides, in part:

> In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek nation under the provisions of article first (1st), treaty of the United States with the Creeks and Seminoles, made and concluded at Washington, D. C., August 7, 1856. In consideration of said grant and cession of their lands, estimated at two million one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole nation the sum of three hundred and twenty-five thousand three hundred and sixty-two ($325,362) dollars, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north

to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written. * * *

Articles III and VIII of the treaty of June 14, 1866, 14 Stat. 785, 786, 788, between the United States and the Creek Nation, provide, in part:

ARTICLE III. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; * * *.

ARTICLE VIII. It is agreed that the Secretary of the Interior forthwith cause the line dividing the Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the commissioner of Indian affairs, the expenses of which survey shall be paid by the United States.

Article I of the Treaty of February 27, 1867, 15 Stat. 531, between the United States and the Pottawatomie tribe of Indians, provides, in part:

> It being the intention of the government that a commission shall visit the Indian country as soon as practicable after the ratification of the treaties contemplating the removal of certain tribes from Kansas, accompanied by delegates from the several tribes proposing to remove, it is agreed that a delegation of the Pottawatomies may accompany said commission in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation: * * *

The Act of May 23, 1872, c. 206, 17 Stat. 159 provides, in part:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to issue certificates by which allotments of land lying within the thirty-mile square tract heretofore selected for the Pottawatomie Indians, and lying next west of the Seminole reservation in the Indian Territory, shall be made to each member of the Pottawatomie band, known as the Pottawatomie citizen band, as follows, viz: * * *

The Act of March 3, 1873, c. 322, 17 Stat. 626, provides:

> Whereas by the third article of the treaty concluded with the Creek Indians June fourteenth, eighteen hundred and sixty-six, said Indians ceded to the United States, for the settlement of friendly Indians and freedmen, the west half of their entire domain, to be divided by a line running north and south; and whereas the recent survey of said line, made in conformity with the provisions of said treaty, includes within the limits of the Creek reservation, east of said line, some of the improvements made on a reservation selected on what was supposed to be the Creek ceded lands, for the Seminole tribe of Indians, which reservation is provided for in their treaty of March first, eighteen hundred and sixty-six, and also some of the improvements of the Sacs and Foxes, of the Mississippi tribe of Indians, made on a reservation intended to be established in accordance with the provisions of their treaty of February eighteenth, eighteen hundred and sixty-seven; and whereas said improvements have been made upon said lands by and for the aforesaid Indians, who have settled thereupon in good faith, in accordance with treaty stipulations; and whereas it is necessary, in order to secure these improvements to said Indians, and to insure them suitable reservations, that the lands occupied thereby should be granted to them; Therefore,
>
> BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES, OF THE UNITED STATES, OF AMERICA, IN CONGRESS ASSEMBLED: That the Secretary of the Interior be, and he hereby is, authorized to negotiate with the aforesaid Creek Indians for the relinquishment to the

United States of such portions of their country as may have been set apart in accordance with treaty stipulations, for the use of the Seminoles, and the Sacs and Foxes of the Mississippi tribes of Indians, respectively, found to be east of the line separating the Creek ceded lands from the Creek reservation, and also to negotiate and arrange with said tribes for a final and permanent adjustment of their reservations; and the Secretary shall report the result to Congress.

The Act of August 5, 1882, c. 390, 22 Stat. 257. 265, appropriates, in part:

> * * * To pay the Creek Nation of Indians for one hundred and seventy-five thousand acres of land now occupied by the Seminole Nation, the sum of one hundred and seventy five thousand dollars, as per agreement made in pursuance of the act of March third, eighteen hundred and seventy three, which agreement bears date February fourteenth, eighteen hundred and eighty one, and is now on file in the Department of the Interior; said sum to be immediately available. * * *

Articles I and II of the Pottawatomie agreement of June 25, 1890, ratified by section 8, of the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016, 1017 provide, in part:

> The Citizen Band of Pottawatomie Indians of the Indian Territory, in consideration of the fulfillment of the promises hereinafter made, hereby cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to the following described tract of country in the Indian Territory—according to Morrill's

survey, under contract of September third, eighteen hundred and seventy-two—to wit: Beginning at a point on the right bank of the north fork of the Canadian River, in section twenty-one, of township eleven north, range five east, where the western boundary line of the Seminole Reservation strikes said river; thence south with said boundary line to the left bank of the Canadian River; * * *

Whereas certain allotments of land have been heretofore made, and are now being made to members of said Citizen Band of Pottawatomie Indians, according to instructions from the Department of the Interior at Washington, under the act of Congress entitled, "An act to provide for the allotment of lands, in severalty, to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, and according to said instructions other allotments are to be made, it is further agreed that all such allotments so made shall be confirmed—all in process of being made shall be completed and confirmed, and all to be made shall be made under the same rules and regulations, as to persons, location and area, as those heretofore made, and when made shall be confirmed. When said allotments shall be so confirmed, and approved by the Secretary of the Interior, the title in each allottee shall be evidenced and protected in every particular, in the same manner and to the extent provided for in the above-mentioned act of Congress: * * *.

Section 2 of Title I of the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provides, in part:

> In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band. * * *

Letter of the Secretary of the Interior to the Commissioner of Indian Affairs:

> DEPARTMENT OF THE INTERIOR,
> WASHINGTON, D. C., *Nov. 9th, 1870.*

SIR: I have considered the recommendation, submitted in your letter of the 3rd inst. that the selection, made by the Pottawatomie Indians, of a tract of country in the Indian territory, for their future home be approved, and that authority be given for the removal of the tribe thereto, under the direction of the proper officer of the Indian Bureau.

The 1st Article of the treaty with the Pottawatomies of February 27th 1867, contemplates their removal to the Indian territory, and provides that a tract of land, not exceeding thirty miles square shall be set apart as a reservation for the exclusive use and occupancy of said tribe upon the terms and conditions set forth in the treaty.

The site selected by these Indians is reported as including the land between the Canadian River and

the North Fork of said river, and bounded on the East, by the West line of the Seminole lands, and extending west, from said boundary line, to embrace nine hundred square miles, to which they are entitled.

I hereby approve the selection made and give the authority for the removal of the Pottawatomies, as recommended by you, with the direction that, until the Western boundary of the Seminole country is surveyed and marked, they will locate so far West of that tribe as not to intrude upon their lands.

Very respectfully,

I am obt. Servant

C. DELANO, *Secretary.*

Hon. E. I. PARKER,

Com. Indian Affairs.

(Exhibit No. 347–348 before the Court of Claims in this case.)

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SUPREME COURT OF THE UNITED STATES.

No. 830.—October Term, 1941.

The Seminole Nation, Petitioner, vs. The United States. } On Writ of Certiorari to the Court of Claims.

[May 11, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

The question presented for decision is whether the United States remains under any obligation to the Seminole Nation with respect to Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756, which provides in part:

". . . The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor for the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, . . ."

Petitioner's claim is for just compensation for the alleged taking by the United States of an asserted deficiency in the tract granted by this Article.

Late in 1866, before the boundaries of the Seminole domain had been located, the Seminoles moved to what was assumed to be their treaty land.[1] The first survey of the line dividing the Creek and the Seminole territories, made by one Rankin, in 1868, under a

[1] Although negotiations were in progress with the Creeks at time the Seminole treaty was made and a treaty was signed with them on February 6, 1866, the Creek treaty was not concluded until June 14, 1866. See 14 Stat. 785. The dividing line between the two halves of the Creek country was not settled until the Bardwell survey was approved in 1872.

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contract with the Superintendent of Indian Affairs, was not approved by the Department of the Interior. In 1871 one Bardwell re-surveyed the dividing line and placed it seven miles west of the Rankin line. Two months later, at the direction of the Government, one Robbins ran the western boundary of the Seminole lands so as to include 200,000 acres from the Bardwell line. According to Robins' calculations 200,000.03 acres were included between the Canadian river on the south, the north fork of the Canadian river on the north, the Bardwell line on the east and the Robbins line on the west. The Bardwell and Robbins surveys were both approved by the Secretary of the Interior on February 5, 1872.

Meanwhile, pursuant to Article I of the Treaty of February 27, 1867, 15 Stat. 531,[2] the Pottawatomie tribe selected a tract bounded "by the West line of the Seminole lands"; and on November 9, 1870, the Secretary of the Interior approved that selection. In 1872, after the location of the Robbins line, the Pottawatomies occupied the territory immediately west of that line. Subsequently, the Government allotted and patented the lands west of the Robbins line to the Pottawatomies in severalty, or sold and patented them to settlers and turned the purchase price into the Treasury as public money.[3]

The Bardwell survey disclosed that a considerable area east of the Seminole-Creek dividing line had been occupied by the Seminoles, who had made substantial improvements on this land. In order that the Seminoles might retain the lands which they had

[2] By that Article the United States agreed that a delegation from the Pottawatomies should accompany a government commission to the Indian country " . . . in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation."

[3] Provision was made for allotting the lands to the Pottawatomies in severalty by Act of May 23, 1872, 17 Stat. 159, and Act of February 5, 1887, 24 Stat. 388. By an agreement ratified by Act of March 3, 1891, 26 Stat. 989, 1016-1047, the Pottawatomies ceded to the Government the tract assigned to them. It was stipulated in the agreement that all allotments in severalty, made or to be made, should be completed and confirmed, and that other allotments in severalty could be made until February 8, 1891. The ratifying act provided that the remaining lands were to be opened to settlement as public lands. 26 Stat. 1026.

improved, Congress authorized negotiations for the purchase of these lands east of the Bardwell line. Act of March 3, 1873, 17 Stat. 626. An agreement was entered into on February 14, 1881, with the Creek Nation whereby that Nation ceded land east of the Bardwell line to the United States, the agreement providing that the eastern boundary of the land ceded was to be drawn so that the tract would aggregate 175,000 acres. *Creek Nation* v. *United States,* 93 C. Cls. 561, 566. The Creeks received $175,000 for this tract. Act of August 5, 1882, 22 Stat. 257, 265. This land became a part of the Seminole domain and was disposed of either by allotment to members of the tribe or by sale for the account of the tribe.

The possibility of a deficiency in the original 200,000 acre tract was first suspected in 1900.[4] By an amended petition filed in the Court of Claims in 1937[5] the Seminole Nation alleged that owing to an error in the location of the Robbins line, the territory enclosed between the Robbins and Bardwell lines was 11,550.54 acres short of 200,000 acres, and that the United States took from the Seminoles 11,550.54 acres west of the Robbins line when the Government patented that land to individuals in 1892 and subsequent years. Judgment was prayed against the United States for value at the time of taking of the 11,550.54 acres, with interest at the rate of five percent per annum. The Court of Claims made no finding as to whether a shortage in fact existed in the tract between the Bardwell and Robbins lines but held that in any event the Seminole Nation was more than compensated for the alleged shortage by the Government's purchase for the Seminoles of 175,000 acres of land from the Creek Nation. The court also stated that even if petitioner were entitled to recover for any deficit in the 200,000 acre tract, the Government would be entitled to offset the value of the 175,000 acre tract as a gratuitous expenditure under the Act of August 12, 1935, 49 Stat. 571, 596, a value assumed to be far in excess of the value of whatever deficit there may have been. We granted certiorari because of the close connection be-

[4] Letter from the Commissioner of Indian Affairs to the Secretary of the Interior, dated February 5, 1900.
Letter from the Acting Secretary of the Interior to the Commission to the Five Civilized Tribes, dated October 16, 1900.

[5] The original petition was filed in 1930. The amended petition was filed after the amendment to the jurisdictional act. 43 Stat. 133, as amended by 50 Stat. 650.

tween this case and *Seminole Nation* v. *United States,* No. 348 this Term, decided today.[6]

The judgment of the Court of Claims cannot be sustained on either of the grounds advanced.

I.

Underlying the denial of recovery for any deficit in the 200,000 acre tract because petitioner was compensated therefor "fifteenfold" by the receipt of an additional 175,000 acres, is the theory that the acquisition of land by the Seminoles under the Treaty of 1866 and the acquisition of additional land to the east by transfer from the Creeks in 1882 were but two parts of an integral transaction, intended to give the Seminoles 200,000 acres of land and thus discharge the obligation of the Treaty of 1866. However, the facts do not support that theory for in 1882 the suggestion that a shortage existed in the supposed 200,000 acre tract between the Bardwell and Robbins lines had not yet been advanced. There was therefore no thought at the time the transfer of the 175,000 acre tract was made that the Government thereby fulfilled its treaty obligation by compensating the Seminoles for a deficiency in the original tract.

II.

The Act of August 12, 1935, 49 Stat. 571, 596, directs the Court of Claims in suits by an Indian tribe or band "to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band." This language plainly requires the Court of Claims to find first that money is due from the United States, to consider then whether the United States has gratuitously spent sums for the benefit of the tribe and, if it finds such gratuitous expenditures, to offset them against the amount found due.

In allowing the gratuity offset here the Court of Claims fell short of complying with the requirements of the offset statute. There was no finding that the United States was under any liability to the Seminole Nation; the Court stated only that the value of the 175,000 acre tract was "far in excess of the value of what-

[6] Petitioner has here limited its claim to 10,351.82 acres, adopting the shortage given in the report, dated March 18, 1941, of Arthur D. Kidder, District Cadastral Engineer of the General Land Office, who surveyed the area after the original petition was filed.

The Government in this Court agrees to this proposition and suggests that the cause be remanded to the Court of Claims.

ever deficit there may have been." The shortcomings of this approach are evident. As we said in *Seminole Nation* v. *United States*, No. 348 this Term, decided today, gratuity offsets resemble a fund in a bank, to be drawn on by the Government as needed. If the Government owes nothing, it is entitled to a dismissal on that ground, and should not be compelled to use its gratuity offsets. If liability exists on the Government's part, the exact amount of gratuitous expenditures utilized to extinguish that liability, in whole or in part, should be precisely found and designated. The Government should not be held to satisfy its liability by the use of gratuity expenditures in excess of the liability. Conversely, the Indian tribe is entitled to have an exact determination of the amount owed it by the United States in order that an amount of gratuity expenditures equal to the liability may be exhausted, or that, if the available offsets are insufficient, it receive a money judgment for the difference. Otherwise confusion and the possibility of a double credit for a single offset arise, as this case and No. 348 abundantly demonstrate. In the latter case a gratuity offset in the amount of $165,847.17 on account of the purchase of the 175,000 acre tract from the Creeks was allowed, and here the assumed value of that tract is the offset employed by the Court of Claims.

The judgment is reversed and the cause remanded to the Court of Claims with directions to consolidate it with No. 348; to determine whether a shortage exists in the 200,000 acre tract; to determine whether the Government is liable therefor, and the amount of such liability, if a shortage exists; and, to find and designate the precise gratuitous expenditures used to offset the total liability, if any, arising from this claim and from Items Two and Five of No. 348.

So ordered.

Mr. Justice REED took no part in the consideration or decision of this case.

Mr. Justice JACKSON dissents.